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Nos. 418, 419

In the Supreme Court of the United States

OCTOBER TERM, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH AND SEVENTH CIRCUITS

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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E. C. ATKINS AND COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH AND SEVENTH CIRCUITS

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case (*Jones*, R. 119–122),[1] is reported at 154 F. 2d

[1] Record references relating to the two respondents herein will appear as follows: *Jones & Laughlin Steel Corporation* (*Jones*, R. —); *E. C. Atkins and Company* (*Atkins*, R. —).

932. The opinion of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case (*Atkins*, R. 320–321), is reported at 155 F. 2d 467. The original opinions of the circuit courts of appeals in the *Jones & Laughlin* (R. 83–89) and *Atkins* (R. 348–366) cases are reported, respectively, in 146 F. 2d 718, and 147 F. 2d 730. The order of this Court, granting writs of certiorari, vacating prior judgments entered by the courts below, and remanding the cases for further consideration, is reported in 325 U. S. 838. The findings of fact, conclusions of law, and orders of the Board in these two cases (*Jones*, R. 61–68, 73–74; *Atkins*, R. 30–42) are reported in 53 N. L. R. B. 1046 and 56 N. L. R. B. 1056, respectively. The decisions of the Board in prior representation proceedings which form part of the record in these cases (*Jones*, R. 52–55; *Atkins*, R. 5–8), are reported in 49 N. L. R. B. 390 and 52 N. L. R. B. 1470, respectively.

JURISDICTION

The decree of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case was entered on April 4, 1946 (*Jones*, R. 118). The petition for rehearing filed by the Board was denied on May 20, 1946 (*Jones*, R. 134). The decree of the Circuit Court of Appeals for the Seventh Circuit in the Atkins case was entered on May 31, 1946 (*Atkins*, R. 322). The petition for writs of certiorari was filed on

August 20, 1946, and was granted on December 23, 1946 (*Jones*, R. 135; *Atkins*, R. 367). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The question presented by the *Atkins* case is whether persons who are employed to guard the property of a private employer, who are compensated by that private employer at rates fixed by him, and who are also civilian auxiliaries to the military police of the Army of the United States, are "employees" within the meaning of Section 2 (3) of the National Labor Relations Act.

2. The questions presented by the *Jones & Laughlin* case are whether, in the light of Section 10 (e) of the Act, the court below could properly consider:

The Circuit Court of Appeals for the Seventh Circuit substituted for the Board's findings of fact concerning the incidents of the economic relation between the plant guards and the company, findings of its own. Since we believe, as we stated in our petition for a writ of certiorari, pp. 3–4, that the court below erred in substituting its findings for those of the Board, the case thus presents, in addition, the question whether the Board's findings of fact are supported by substantial evidence and we discuss this question in the Argument below (*infra*, pp. 64–85). This question need not necessarily be decided, however, since it is our position that even on the facts as found by the court, the Board's order should be enforced.

(a) the effect of the plant guards' deputization by local police authorities upon their collective bargaining rights, no facts concerning such deputization having been presented to the Board.

(b) whether the Board erred in not restricting the freedom of choice of militarized and deputized plant guards to organizations not representing production and maintenance employees, no objection on this ground having been raised before the Board.

3. Assuming that the matters described in question 2 could properly have been considered by the court below, a further question presented by the *Jones & Laughlin* case is whether the Board, in the exercise of its administrative discretion, may properly require an employer to bargain collectively with a labor organization as the representative of the employer's plant protection employees, when those employees are members of the civilian auxiliary to the military police of the Army of the United States, or when they are deputized by local police authorities, if the labor organization which represents them also represents a bargaining unit composed of the employer's production and maintenance employees.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*) are set forth in Appendix A, *infra*, pp. 130–133. The pertinent regulations of the War Department

relating to the guard force of the civilian auxiliary to the military police, established pursuant to Executive Order No. 8972, dated December 12, 1941 (6 Fed. Reg. 6420, *Atkins*, R. 344–345), are set forth in Appendix B, *infra*, pp. 134–160.[3]

STATEMENT

I

The *Jones & Laughlin* Case

On March 15, 1943, the United Steelworkers of America (CIO), hereinafter called the Steelworkers, filed with the National Labor Relations Board a petition for investigation and certification of representatives pursuant to Section 9 (c) of the Act, in which it sought to be certified as the representative for collective bargaining of a unit composed of the approximately 60 patrolmen, watchmen, firemen and dump laborers employed by the Jones & Laughlin Steel Corporation, hereinafter called the respondent Jones & Laughlin, at its Otis Works in Cleveland, Ohio (*Jones*, R. 1–2).

At the opening of the hearing which the Board held upon this petition, the respondent Jones & Laughlin moved to dismiss the petition upon the ground that a unit composed of the employees in

[3] The Circuit Court of Appeals for the Seventh Circuit correctly held in the *Atkins* case that these War Department regulations are public documents of which the Board and the courts may take judicial notice (*Atkins*, R. 353, n. 1). Cf. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 183–484.

question was not appropriate because these employees "perform certain assigned work that is strictly representative of management" (*Jones*, R. 8). In support of this contention, the respondent Jones & Laughlin asserted that on December 11, 1942, the Steelworkers had entered into a collective bargaining agreement covering employees at many plants, including the two known as the Otis Works, in which the Steelworkers agreed that the term "employee" in that agreement be defined as excluding foremen, assistant foremen, watchmen, salaried employees and nurses (*Jones*, R. 5–6); that by this agreement the Steelworkers expressed their desire "to have these people serve management's interest without other affiliation" (*Jones*, R. 6); and that any allegation by the Steelworkers that a unit including watchmen is appropriate is "a direct contravention of the covenants of the existing labor agreement" (*Jones*, R. 6). As part of this motion, it was stated that "It is the position of the Jones & Laughlin Corporation in this case that the unionization of watchmen or guards is not appropriate at any time—certainly not at the present time in the midst of the War program," that "these guards are charged with the responsibility for the protection of the physical plant and equipment of the Corporation," that their duties "do not differ greatly from the duties performed by members of a city, county or state police force" and "In addition, it must be realized that

those guards are now and for some time past have been sworn in as Auxiliary Military Police, and, in this connection, are under the direct supervision and jurisdiction of the United States Army" (*Jones*, R. 6–7.

Included in the motion was the full text of the oath of allegiance which each guard takes upon becoming a member of the civilian auxiliary to the military police. In the oath, the guard states that he has been or is about to be employed by Jones & Laughlin Steel Corporation as a guard at its Otis Works, and, in consideration of his employment or the continuation of his employment, he agrees with the United States that he will "support and defend the Constitution of the United States against all enemies, foreign and domestic", "bear true faith and allegiance to the Constitution of the United States", "will well and faithfully discharge" his "duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith, by the President, as Commander in Chief of the Army and Navy of the United States, and by his duly authorized officers" and acknowledges "that the appropriate Articles of War have been read and explained to me, and that in the performance" of his "duty to protect such war material, war premises, and war utilities" he is "subject to mili-

tary law during the period" of his "employment" (*Jones,* R. 7).

The trial examiner, acting in accordance with the Board's Rules and Regulations, did not rule on this motion but referred it to the Board itself in Washington and proceeded to receive evidence. It was stipulated that the respondent Jones & Laughlin employs at its Otis Works approximately 4,700 employees (*Jones,* R. 5), including 72 plant protection employees; that the plant protection employees are divided into the following categories: 58 patrolmen, 2 firemen, 2 dump laborers, 8 lieutenants, and 2 fire captains (*Jones,* R. 4). It was also stipulated that the company was engaged in production for the national war effort (*Jones,* R. 4).

A representative of the respondent's personnel department testified that the sole duty of the 58 patrolmen was to protect plant property, that they received their pay from the company and as far as he knew the company could discharge them (*Jones,* R. 8–9). He also testified that they wore uniforms, he believed that they carried arms but was not certain, and had been sworn into the auxiliary military police (*Jones,* R. 8–9). He described the duties of the two firemen as keeping the fire equipment, hose, wagons and fire extinguishers in shape for immediate use in case of fire (*Jones,* R. 9), and explained that the two dump laborers were assigned to a refuse dump where

they were engaged in recovering scrap from slag, in connection with which they theoretically watch that section of the plant and therefore have been included in the plant protection department (*Jones*, R. 9–10). The eight lieutenants and two fire-captains are the supervisors in charge of the 58 patrolmen, two firemen and two dump laborers (*Jones*, R. 10). All of these employees, including the 58 patrolmen, two firemen and two dump laborers, are carried on the company's payroll, are paid at an hourly rate, are paid at the same time, by the same procedures and subject to the same group benefit arrangements that are applied to the other employees of the company (*Jones*, R. 14).

The Steelworkers introduced in evidence a copy of its agreement with the respondent Jones & Laughlin, signed on December 11, 1942 (*Jones*, R. 12–13, 16–33), which mentioned plant protection employees only in one sentence, appearing in Section 1 and reading as follows (*Jones*, R. 16):

> The term "employee" as used in this Agreement, shall not include Foremen or Assistant Foremen in charge of any classes of labor, watchmen, salaried employees and nurses.

The representative of the Steelworkers stated its position to be that this agreement contained "nothing to prevent us from going ahead with organizing this group of people and bargaining for them separately" (*Jones*, R. 13).

The respondent Jones & Laughlin did not offer any evidence during the representation proceeding. Its counsel did make a statement for the record in which he read certain of the Articles of War which he asserted were applicable to plant guards (*Jones*, R. 10–11), and received permission to include a citation to the transcript of certain testimony before the House Military Affairs Committee respecting unionization of guards (*Jones*, R. 11–12).[1]

On May 3, 1943, the Board issued its decision and direction of election, in which it denied the company's motion to dismiss the petition (*Jones*, R. 52), found that "all patrolmen, watchmen, and firemen, including dump laborers, employed by the Company at its Otis Works, but excluding lieutenants, captains and supervisors" consfitute an appropriate unit (*Jones*, R. 54), and directed the

[1] While the trial examiner, without objection from the respondent, ordered that all of counsel's statement "beginning with the story of the plant guard having found a man asleep be physically expunged from the record—be stricken from the record and physically expunged from the record, except insofar as the right to cite the incident by page number in a transcript later to be used is reserved to the party", the record as printed contains counsel's statement in full (*Jones*, R. 11–12). A copy of the testimony which counsel was summarizing from memory was later supplied to the Board (see statement in the Board's decision, *Jones*, R. 52), but was never incorporated in the record. The testimony in question appears in Hearings before the Committee on Military Affairs, House, 78th Cong., 1st Sess., on H. R. 2239, H. R. 1742, H. R. 1728 and H. R. 992, pp. 161–172.

holding of an election to determine whether the employees in this unit desire to be represented by the Steelworkers (*Jones*, R. 54–55). The Board stated the company's contention and its reason for rejecting it as follows (*Jones*, R. 53–54):

> The Company maintains that such employees are not an appropriate unit, claiming that these employees should not be permitted to choose a collective bargaining agent since they are either sworn members of the auxiliary military police or under its control. However, the record discloses that although the employees in the proposed unit take the Army oath, they are under the control of the Company as to pay, conditions of employment, and benefits. We have frequently found that plant guards hired and paid by private employers, are employees within the meaning of the Act, and may designate a representative for the purposes of collective bargaining, even though they are members of the auxiliary military police (citing cases). Accordingly, the Company's contention is rejected.
>
> The Union already represents all production and maintenance employees of the Company under a contract dated December 2, 1942, and the employees in the unit proposed herein are specifically excluded from the benefits of the above-mentioned contract. However, the Union does not intend to merge the plant-protection employees with the unit for which it has already been recog-

nized as the exclusive bargaining agent, but intends to bargain for them as a separate unit. We have, on several occasions heretofore, permitted the same labor organization to bargain for the production and maintenance employees and the plant-protection employees in separate units (citing cases).

The election was held on May 26, 1943, at which time there were approximately 56 eligible voters, of whom 52 cast ballots, 37 for the Steelworkers and 15 against (*Jones*, R. 33). The Board, accordingly, on June 5, 1943, certified the Steelworkers as the exclusive representative of the employees within the unit found appropriate (*Jones*, R. 34–35).

After the Steelworkers had filed charges with the Board alleging that the respondent Jones and Laughlin had refused to bargain with it, the Board, on September 16, 1943, issued its complaint based thereon (*Jones*, R. 35–38). Respondent answered, admitting the allegations of the complaint except as to the appropriateness of the unit and the continuing character of its refusal to bargain (*Jones*, R. 38–41). It admitted that on June 23, 1943, it had refused to bargain with the Steelworkers, but alleged that its subsequent refusal to bargain was based on its desire to await the outcome of a case involving the plant guards at its Pittsburgh Works before taking a final position, and that, therefore,

its refusal to bargain was only qualified and conditional (*Jones*, R. 40).

At the hearing held on the complaint, none of the parties produced any witnesses but merely stipulated into the record certain documents. The Board, in support of its case, introduced the formal papers in the prior proceedings resulting in certification of the Steelworkers (*Jones*, R. 41–45, 52–55) and the following correspondence: A letter from the Jones & Laughlin Corporation addressed "To All Patrolmen, Watchmen, Firemen, and Dump Laborers at the Otis Works of Jones & Laughlin Steel Corporation" dated May 25, 1943, in which it is recited that the Board has directed an election among the plant guards; that the Company "has consistently maintained that supervisors and plant guards should not be included in bargaining units because both groups represent management", that the Board has ruled that supervisory employees cannot be a bargaining group, that "It is our intention to use every legal means available to us to secure a similar decision with respect to our plant guards" and that "Any plant guard who does not wish to continue as a part of management, who believes his interests require representation, and feels that he is more a part of the production and maintenance group than the management staff, will, upon request, be transferred to an equivalent production or mainte-

nance occupation" (*Jones,* R. 46–47, 57). A letter from the Steelworkers to the Company dated May 28, 1943, requesting bargaining and the reply of the Company dated June 23, 1943, in which the Company refused to bargain stating, "As you are well aware, the Corporation objected and still objects to the appropriateness of plant guards as a bargaining unit. * * * it is our intention to use every legal means available to us to have plant guards classified with Supervisors in respect to collective bargaining" (*Jones,* R. 45–46, 55–56).

At the hearing, the respondent Jones & Laughlin defended on the ground that it had not yet decided whether to bargain with the Steelworkers but still desired further time to consider the matter. In order to "elaborate" and "clarify" the allegation in its answer to this effect (*Jones,* R. 40, 47–50), the respondent introduced in evidence the following correspondence: A letter from the Board's field examiner to the Corporation dated August 44, 1943, stating that charges of refusal to bargain had been filed by the Steelworkers and inquiring whether the Corporation had definitely decided not to bargain with the Steelworkers as the representative of the plant guards at its Otis Works (*Jones,* R. 47, 58). A letter from the Corporation to the Board's field examiner, dated September 4, 1943, stating that the Corporation was awaiting decision by the Board of a case

respecting the plant guards at its Pittsburgh Works before taking a final position as to bargaining with representatives of its plant guards (*Jones*, R. 47–48, 59). Identical letters from the Corporation to each member of the Board dated September 7, 1943, making no reference to the case involving the plant guards at its Otis Works, but referring solely to the case involving the plant guards at its Pittsburgh Works, the essence of which letters appears in the following quotation (*Jones*, R. 50–51, 59–60):

> On August 31, 1943, the National Labor Relations Board upon petition of the United Steelworkers of America held a hearing in Pittsburgh, Pennsylvania, involving Plant Guards of the Pittsburgh Works of Jones & Laughlin Steel Corporation. The Corporation moved to dismiss the Petition because the Petitioner is the same labor organization that represents production and maintenance employees in all of its steel plants, including the Pittsburgh Works, and in the 1942 Agreement between the Corporation and the Union, now in force, watchmen or guards are specifically excluded, together with foremen, salaried employees and nurses.
>
> * * * * *
>
> The Corporation has given serious consideration to testing the appropriateness of a unit composed of Plant Guards in the U. S. Circuit Court of Appeals. How-

ever, corporate officials feel that they would like to have the benefit of oral argument before the Board and some discussion with Board members themselves prior to making a definite decision with regard to bargaining with certified representatives of Plant Guards.

Therefore, will you please consider this as a request for oral hearing before the Board and a further request that you as an individual Board member, grant representatives of the Corporation opportunity for discussion with you.

And a letter from the Board to the Corporation, dated September 11, 1943, entitled in the Pittsburgh plant guard case,[5] acknowledging receipt of the Corporation's letter of September 7 (*Jones*, R. 51, 61).

On October 5, 1943, the trial examiner issued his intermediate report reaffirming the appropri-

[5] On the Board's records, the instant cases involving the plant guards at the Otis Works bore the numbers 8–R–1056, and R–5143 for the representation case (*Jones*, R. 1, 2, 52, 62, 75, 76) and 8–C–1548 for the complaint case (*Jones*, R. 35, 41, 58, 59, 75, 76), whereas the case involving the plant guards at the Pittsburgh Works bore the number 6–R–770 (*Jones*, R. 61; see *Matter of Jones & Laughlin Steel Corp.*, 52 N. L. R. B. 975; *Matter of Jones & Laughlin Steel Corp.*, 21 War Lab. Rep. 240; *Jones & Laughlin Steel Corp.* v. *United Steelworkers of America*, 17 L. R. R. M. 854, dismissing complaint for declaratory judgment as to validity of certification of representatives for the plant guards at the Pittsburgh Works, which matter is now pending on appeal in the Court of Appeals for the District of Columbia. Case No. 9334, set for argument on March 11, 1947).

ateness of the unit and finding that the respondent Jones & Laughlin had refused to bargain collectively with the Steelworkers (*Jones*, R. 61–68). On November 4, 1943, the respondent filed exceptions to the intermediate report on the grounds that plant guards are employers within the meaning of Section 2 (2) of the Act and therefore not employees within the meaning of Section 2 (3) of the Act (*Jones*, R. 68–69) and that plant guards, because of their supervisory status, do not constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the Act (*Jones*, R. 69–70). On December 2, 1943, the Board issued its decision adopting the findings, conclusions and recommendations of the intermediate report, and entered its order requiring the respondent Jones & Laughlin to cease and desist from its unfair labor practices, to bargain collectively with the Steelworkers and to post the usual notices (*Jones*, R. 73–74).

Upon petition of the Board for enforcement (*Jones*, R. 76–79), the Circuit Court of Appeals for the Sixth Circuit, on December 8, 1944, issued its decision denying enforcement of the Board's order (*Jones*, R. 83–89). The court upheld the Board's determination that the plant protection employees here involved are employees within the meaning of the Act (*Jones*, R. 84–85). But it set aside the Board's determination of the appropriateness of the unit, holding that the Board, in the exercise of its "wide discretion in deter-

mining whether the units selected were appropriate" (*Jones*, R. 85) neglected to give "due regard to the national welfare" when it authorized respondent's militarized plant protection employees to join the same union as represented respondent's production and maintenance employees because "when they were inducted into the Unions and became subject to their orders, rules and decisions, the plant protection employees assumed obligations to the Unions and their fellow workers, which might well in given circumstances bring them in conflict with their obligation to their employers, and with their paramount duty as militarized police of the United States Government" (*Jones*, R. 88).

The Board filed a petition for rehearing in which it pointed out that its prior briefing of the case had been concerned with respondent's contention "that plant protection employees are not employees within the meaning of the Act" which had been the contention "primarily pressed upon the Board, rather than with the impact of the militarized status of plant protection employees upon the bargaining unit or the type of bargaining agency which the employees may select" (*Jones*, R. 90). In addition to arguing that the court below took an erroneous view with respect to these matters, the petition for rehearing stated that the Board had been informed by the Army that it was engaged in a policy of demilitarizing plant guards and had already demilitarized those employed at

the plants of Jones & Laughlin Corporation here involved (*Jones,* R. 93, n. 6). It also stated that, in accordance with the Steelworker's undertaking to bargain for the plant protection employees separately from the production employees, as stated at the hearing in the representation case (*Jones,* R. 13) and relied upon by the Board in its decision and direction of election (*Jones,* R. 54), the Board had been "informed by our Regional Office that the International Union, involved in the Jones & Laughlin case, chartered a separate local for plant protection employees" (*Jones,* R. 92). The court below denied the Board's petition for rehearing (*Jones,* R. 111).

The Board thereupon filed a petition for writ of certiorari to review the decision of the court below (No. 1237, October Term, 1944). In its petition the Board pointed out, *inter alia,* that on May 29, 1944, a date subsequent to the refusals to bargain, the plant protection employees at the plants here involved were demilitarized and were no longer members of the Auxiliary Military Police (Petition for Writs of Certiorari, Nos. 1236, 1237, 1238, October Term, 1944, p. 27). The Board urged that this fact should not be regarded as rendering moot either the Board's order or the question of the effect of militarization upon the employee status of the guards, since the guards were militarized at the time the refusals to bargain occurred, and unless the employers were then bound to bargain with the representatives of the guards,

there were no unfair labor practices and the Board's orders were invalid (*id.* at p. 28). The Board further suggested that the only effect of the demilitarization was to deprive the respondent of the future use of militarization as a defense for refusing to bargain. This Court granted the writ of certiorari, vacated the judgment below, and remanded the case to the circuit court of appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders." 325 U. S. 838.

Pursuant to the remand, the respondent Jones & Laughlin and the Board entered into a stipulation respecting the dates and circumstances of the demilitarization of the guards (*Jones*, R. 114–118). It was stipulated that the "qualifications, strength, functions and duties of the plant guard force during the period of their militarization, were not materially different from" those existing subsequent to demilitarization or those existing prior thereto, except that during militarization the plant guards were subject to certain additional obligations (*Jones*, R. 117). Included also in the stipulation, though clearly beyond the terms of the remand and the issues open under it,[6] were facts showing that the plant guards of respondent Jones & Laughlin were, at all times relevant to these proceedings,

[6] The stipulation clearly reserved the right of all parties to contend that any of the facts contained therein are irrelevant to the issues in the proceedings (*Jones*, R. 114).

commissioned as private policemen of the City of Cleveland, and exercised "the legal powers of peace officers in their work as plant guards" (*Jones*, R. 115).[2]

The Board thereafter filed in the Circuit Court of Appeals for the Sixth Circuit a motion for a decree enforcing its order, pointing out that the demilitarization of the plant guards here involved removed the obstacles which that court, when the case was first before it, had believed warranted it in refusing to enforce the Board's order (*Jones*, R. 112–114). This motion was denied (*Jones*, R. 119–122). The court below held that not only the facts concerning demilitarization, but also the facts relating to the deputization of the guards which were embodied in the stipulation (*Jones*, R. 114–118), were to be considered as though they "had been presented at the hearing before the Board" (*Jones*, R. 120). The court thereby overruled the Board's contention that the facts concerning deputization could not properly be considered (*Jones*, R. 124–127). It further

[2] There is absolutely no basis in the record for the assertion made by the respondent Jones & Laughlin in its brief opposing the Board's petition for a writ of certiorari in this case (n. 3, pp. 4–5), that, during the period of militarization, the plant guards were not members of the municipal police force of the City of Cleveland. The stipulation shows that during the period of "militarization," the guards were subject "to their obligations as police" (*Jones*, R. 117, 115–116), and respondent so informed this Court in its opposition to the Board's petition for a writ of certiorari in No. 1237, October Term, 1944 (p. 6). Compare *Jones*, R. 124, n. 2.

held that the guards were "employees" within the meaning of the Act, but concluded that in view of the "drastic police powers" exercised by the guards, as shown by the stipulation, it was improper for the Board to permit their organization by the same union which represents the production employees" (*Jones*, R. 121).

II

The *Atkins* Case

On September 10, 1943, the International Association of Machinists, District 90 and their affiliate, Local 1683, hereinafter called the Machinists, filed with the Board a petition for investigation and certification of representatives pursuant to Section 9 (c) of the Act. The Machinists alleged that it represented the approximately 64 plant guards employed by E. C. Atkins and Company, hereinafter called the respondent Atkins (*Atkins*, R. 95–96). At the opening of the hearing on this petition, the respondent Atkins moved to dismiss the petition for the reason that the respondent Atkins "is not and cannot be an employer within the meaning of" Section 2 (2) of the Act "with respect to Auxiliary Military Police who wholly constitute the bargaining unit" requested in the petition and "further, for the reason that the employees referred to in such Petition cannot come within the definition of the word 'employees' under the provisions of" Sec-

tion 2 (3) of the Act with respect to the alleged employer, respondent Atkins (*Atkins*, R. 46). The evidence introduced at the hearing relevant to this issue may be summarized as follows:

Respondent Atkins, an Indiana corporation, at all material times, was engaged in the manufacture of saws, tools and armor plate at the two plants here involved, located at Indianapolis, Indiana (*Atkins*, R. 46).[8] These products were advertised for sale in industrial magazines and periodicals and were sold to jobbers, dealers, subcontractors, and direct to manufacturing consumers, as well as to the United States Government (*Atkins*, R. 47). The approximately 1,200 production and maintenance employees employed by the respondent Atkins at the two plants are covered by a union shop agreement between the company and the United Steelworkers of America, C. I. O., except that its 59 saw smiths are covered by a closed shop agreement between the company and Sawsmith's Local Union No. 18,548, A. F. L. (*Atkins*, R. 85–88, 162–174). The plant protection employees at both plants, like plant protection employees in many other "civilian plants" producing materials in which the Government was "directly interested" (Appendix B, *infra*, pp. 134, 140), were

[8] One of the two plants had been owned and operated by the company since 1857; the other plant, known as the "Fall Creek Ordnance Plant," was owned by the United States Government but operated by the company (*Atkins*, R. 46, 86).

enrolled as members of the civilian auxiliary to the military police (*Atkins*, R. 52, 59, 68–69, 88–89), a guard force established by the War Department as a security precaution for the protection of strategic premises and materials important to the prosecution of the war (*Atkins*, R. 59–60, 105–112).[9]

Respondent Atkins recruited the bulk of its guard force after the military authorities recommended that in order to fulfill the requirements for obtaining war contracts additional guards be hired (*Atkins*, R. 52, 54, 68, 85, 88–89). Its peacetime plant protection force consisted of between four and six watchmen (*Atkins*, R. 88). These watchmen, who had been in the employ of the company before the militarization program was instituted, were enrolled as civilian auxiliaries to the military police and remained on their jobs (*Atkins*, R. 88). The additional guards were hired through the usual employment channels of the respondent Atkins, that is by filling out the blank form of application for employment with respondent Atkins required of all prospective employees and being interviewed by the personnel manager (*Atkins*, R. 53, 58–59, 68–71, 80, 82, 91–92, 112–115). All of the watchmen,

[9] Approximately 200,000 plant guards throughout the country became members of the civilian auxiliary to the military police. Hearings before the Committee on the Judiciary, U. S. Senate, 78th Cong., 1st Sess., on S. 1227, p. 19. See *infra*, pp. 64–73.

those formerly employed as well as those newly hired, became members of the civilian auxiliary to the military police after they, as employees of respondent Atkins, entered into an agreement with the United States of America which recited that in consideration of their employment or the continuation of their employment by respondent Atkins they assumed certain additional obligations to the United States pertaining to policing property essential to the war effort (*Atkins*, R. 54–55, 59, 68–71, 80, 103–104). The only rank and file guard who testified at the hearing, when asked who had the authority to discharge him, answered that the personnel manager or the chief guard of respondent Atkins could (*Atkins*, R. 53–54). The chief guard and the personnel manager, while admitting that they could remove a guard at any time they so desired, pointed to Paragraph 25 of the directive on Auxiliary Police, issued by the Continuous Security District Office of the War Department, Cincinnati, Ohio, as limiting their authority (*Atkins*, R. 59–60, 72, 84, 89, 92, 109). Paragraphs 24 and 25 of this directive provide (*Atkins*, R. 59–60, 109):

> 24. Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25. All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private

employer may, as heretofore, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary.

25. A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guards enrollment as a member of the Auxiliary Military Police. This will usually be done on the management's recommendation unless an emergency requires the guard's retention.

Respondent Atkins carried the guards upon its regular pay rolls, unilaterally determined their rate of compensation, and paid their wages, after making appropriate pay roll deductions (*Atkins*, R. 53–54, 82, 85, 93).[10] The guard force was under the immediate supervision of a chief guard

[10] In the *Atkins* case, the record is clear that the cost of the guards' wages was borne by the company and not by the United States Government; the company did not operate on "a cost-plus basis" (*Atkins*, R. 332–333, 326–327).

and his lieutenants, all of whom were civilians (*Atkins,* R. 58, 62, 68–71, 77–79, 81–82). The chief guard at the Atkins plant testified that he was hired "at the personnel office" of the Company "to be chief subject to the approval of the Government" (*Atkins,* R. 82). The hours of work and work assignments of the individual guards were determined by civilian authority. The chief guard was given a more or less free hand by the respondent in his handling of the guards (*Atkins,* R. 78–82, 62). Thus, on his own initiative, he established a system of rotating shifts for the guard force (*Atkins,* R. 78–79), and, without consulting higher management, he promoted guards to supervisory positions on the guard force, at increased wages (*Atkins,* R. 82). The chief guard took such action without notifying or consulting military authorities (*Atkins,* R. 82). When asked who he recognized as his supervisor in addition to the chief guard and his four lieutenants, the only rank and file guard who testified at the hearing named Woods, personnel manager, and Atkins, general superintendent (*Atkins,* R. 62–63, 172, 173).

So far as the record shows, the only orders concerning the performance by the guards of their duties as civilian auxiliaries, which were transmitted to the chief guard by a District Plant Guard Officer stationed at the Continuous Security District office of the War Department at Cincinnati, were general orders applicable to

all militarized guards at all plants, not orders applicable only to the guards of respondent Atkins (*Atkins*, R. 73–76, 155–158). The chief guard, when asked by counsel for the Company (*Atkins*, R. 75),

> Q. Do you take any orders from Mr. Wood who sits here in the courtroom and is the personnel director of E. C. Atkins and Company?

answered

> A. Yes, naturally; I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.

Besides identifying as the only general orders which he had received from the Army, three orders applicable to all guard forces (*Atkins*, R. 73–74, 155–158) and admitting that his correspondence with the Army dealt largely with his reports on who had been hired for the guard force or had been laid off in order to be discharged therefrom (*Atkins*, R. 83–84), the chief guard testified that special orders to the guard force would in most instances "come from myself" (*Atkins*, R. 77–78). He testified that the members of the plant guard force would not take orders from the other supervisory personnel of respondent Atkins but would cooperate with any request in any way they could (*Atkins*, R. 77–78). The personnel

director likewise testified that he did not give orders respecting the plant guards but merely made recommendations to the chief guard as to what they should do (*Atkins*, R. 89–90).

Military officers did not oust the chief guard of his plenary authority as a supervisory employee of respondent Atkins over performance by the guards of their "ordinary protective duties." Indeed, the directive of the Continuous Security District Office of the War Department in Cincinnati, under which respondent Atkins operated, itself provided that at civilian operated plants no orders would be issued except after the "plant management has indicated its concurrence by signing the guard order in the lower lefthand corner", that a member of the Army "will be in command for purposes of instruction and drilling and, in particular, to take over the command of the force if and when an emergency justifying such action occurs" (*Atkins*, R. 59–60, 108–109). No emergency having arisen, the only direct contact which any of the employees, in the unit sought as appropriate, had with the military authorities was for the one hour a week of instruction which the guards received from the military authorities pursuant to the regulation (*Atkins*, R. 63, 79). This dealt with "Military Police subjects only" (*Atkins*, R. 79). Except as to this one hour a week, all of the direction of this guard force was by the usual channels of plant supervision in accordance

with the provisions in the directives of the district office of the War Department which provide that except for the one hour a week of military instruction and drill, and except in case of emergencies, the Army will exercise its authority only through the civilian guard supervision established by plant management (*Atkins,* R. 59–60, 62–63, 108–109, 111).

The only rank and file guard who testified at the hearing, when asked what do the "guards do", stated that "In general, they guard the plant, supposed to obey all the general orders and specific orders which the Company asks us to obey" (*Atkins,* R. 52). Thus, guards were required generally to watch the plant gates and identify employees entering or leaving the plant, inspect all packages carried into or out of the plant, carry cash to different places in the plant, keep a lookout for fire hazards, and, in short, to police the plant premises with a view to preventing sabotage or destruction of property (*Atkins,* R. 52–53, 76, 80, 88). While on duty the guards wore uniforms and were armed with a revolver which, under the directive of the district office of the War Department, the respondent Atkins was obligated to furnish (*Atkins,* R. 52, 59–60, 78, 110).

Local 1683 of the Machinists, the petitioning union, is a local composed solely of plant protection employees (*Atkins,* R. 63). It admits to membership plant protection employees of other

employers as well as those in the employ of E. C. Atkins and Company and has contracts with Curtis Wright Corporation, Merz Company, Marmon-Harrington Company, and International Machine Tool Company covering plant protection employees (*Atkins*, R. 60–61, 65–66).

Upon the basis of the foregoing evidence, the Board on October 19, 1943, issued its decision and direction of election determining that the plant guards in question, despite their status of civilian auxiliaries to the military police, were employees within the meaning of Section 2 (3) of the Act, that "all plant guards at the Company's two Indianapolis plants, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or effectively recommend such action" constituted an appropriate unit, and directing an election to determine whether or not the employees within the unit found appropriate desire to be represented by the Machinists for the purposes of collective bargaining (*Atkins*, R. 5–8). On November 17, 1943, in the election conducted by the Board, of the approximately 56 persons eligible to vote, 55 ballots were cast of which 50 were cast for the Machinists and 5 against (*Atkins*, R. 16). The Board, accordingly, on November 29, 1943, certified the Machinists as the exclusive representative of the plant guards in the unit found appropriate (*Atkins*, R. 17).

Thereafter, the Machinists filed charges that the respondent Atkins had refused to bargain collectively, the Board issued a complaint thereon and held the usual hearing (*Atkins*, R. 288–291). The only additional evidence received at this hearing pertained to the request for and refusal of the respondent Atkins to grant collective bargaining to the Machinists (*Atkins*, R. 269–319). Thereafter, the Board on May 30, 1944, issued its decision in which it made the following findings with respect to the employee status of the guards: [11]

The guards are interviewed for employment by the respondent and not by the United States of America and are hired by the respondent (*Atkins*, R. 31; 53, 58–59, 68–71, 80–82, 91–92). Their discharge is ordinarily initiated by the respondent (*Atkins*, R. 31; 59–60, 72, 84, 89, 92, 109). During their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America (*Atkins*, R. 31; 53–54, 82, 85, 93). The chief guard works very closely and cooperates with respondent's representatives (*Atkins*, R. 31; 75, 78, 89). Admittedly, the respondent can temporarily suspend a guard from duty (*Atkins*, R. 31; 53–54, 72, 81, 84). Wood, the respondent's personnel director, referred to the guards as respondent's employees and testified that the respondent makes the neces-

[11] In the following paragraph the references preceding the semicolon are to the Board's decision; succeeding references are to the supporting evidence.

sary pay-roll deductions before paying them their wages (*Atkins*, R. 31; 85).

Upon the basis of these findings, the Board concluded (*Atkins*, R. 32):

> It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act. Under the circumstances and upon the entire record, we find, as we did in the preceding representation case, that the guards are employees of the respondent.

The Board also found that the respondent Atkins had, on December 20, 1943, and at all times thereafter, refused to bargain collectively with the Machinists as the exclusive representative of the plant guards in the unit found appropriate, thereby engaging in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act (*Atkins*, 30–42). The Board accordingly ordered the respondent Atkins to cease and desist from its unfair labor practices, upon request to bargain collectively with the Machinists, and to post appropriate notices (*Atkins*, R. 32–33).

The Board filed a petition for enforcement of its

order against respondent Atkins in the Circuit Court of Appeals for the Seventh Circuit (*Atkins*, R. 337–339). The court refused to enforce the Board's order primarily on the ground that militarized guards were not "employees" within the meaning of the Act (*Atkins*, R. 348–366).

The Board filed a petition for a writ of certiorari to review this decision (No. 1238, October Term, 1944). In its petition, the Board noted that the guard force at one of the Atkins plants here involved had been demilitarized on January 6, 1944, and the other on March 7, 1944 (Petition for Writs of Certiorari, No. 1238, October Term, 1944, p. 27). As in the *Jones & Laughlin* case (pp. 19–20 *supra*) the Board urged that the demilitarization did not render the case moot. This Court granted the writ of certiorari, vacated the judgment below, and remanded the case to the Circuit Court of Appeals for the Seventh Circuit "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders." 325 U. S. 838.

Pursuant to the remand, the Board and the respondent Atkins entered into a stipulation respecting the dates and circumstances of the demilitarization of the guards here involved (*Atkins*, Stipulation). Included also in the stipulation, though clearly beyond the terms of the remand and the issues open under it, were facts

showing that the plant guards of the respondent Atkins had been "sworn in as Deputy Policemen by the City of Indianapolis" (*Atkins*, Stipulation, p. 11). The stipulation reserved the right of the Board to contend that any of the facts contained therein were irrelevant to the issues in the proceeding (*Atkins*, Stipulation, p. 12).

The Board thereafter filed in the Circuit Court of Appeals for the Seventh Circuit a motion for a decree enforcing its order, which was denied (*Atkins*, R. 320-322). The court held that "the facts relative to the changed status of the plant guards by reason of their demilitarization * * * are irrelevant to * * * our decision that the plant guards were not [at the time of the refusal to bargain] employees of respondent within the meaning of the Act" (*Atkins*, R. 321), and reaffirmed that holding.

SPECIFICATION OF ERRORS TO BE URGED

In the *Atkins* case, the Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that guards who are members of the civilian auxiliary to the military police are not employees within the meaning of the Act.

2. In holding that the Board's findings of fact concerning the economic relation between the guards and E. C. Atkins and Company are not supported by substantial evidence.

3. In holding that "since 1941, respondent has

been engaged exclusively in the manufacture of armor plate for the federal government."

4. In holding that "respondent was reimbursed by the government for all costs accrued in the manufacture of war material, including that of compensation paid to the guards."

5. In holding that "it makes no difference whether they [the militarized guards] were paid by respondent or by the government."

6. In holding that the authority to hire and discharge a militarized guard was solely the prerogative of the military, and that respondent's authority was limited to making recommendations for such action.

7. In holding that the War Department regulations leave "little room for the contention that respondent had the right but failed to exercise control" over the militarized guards and that "all authority and control was taken over by the Army and none was exercised by respondent."

8. In holding that a producer of war materials for the United States Government, whose labor costs are reimbursed by the Government, cannot be found to be an employer within the meaning of the Act.

9. In failing to give any weight to the Board's determination, based on its settled policy, that, despite their militarization, plant guards are employees of respondent within the meaning of the Act and are entitled to exercise the collective

bargaining rights guaranteed by the Act, and in substituting its own inferences and judgment for those of the Board with respect to the guards' employment status.

10. In setting aside and denying enforcement to the Board's order.

In the *Jones & Laughlin* case the Circuit Court of Appeals for the Sixth Circuit erred:

1. In considering facts concerning the private police status of the guards which were never presented to the Board.

2. In passing upon the question whether, because of their militarization and deputization, the plant guards should be permitted to bargain through a labor organization also representing a separate unit of the employer's production and maintenance employees, no such question having been raised before the Board.

3. In holding that it would not effectuate the policies of the Act and would be against the public interest, to permit an employer's plant protection employees, who constitute an appropriate bargaining unit, and who are members of the civilian auxiliary to the military police, and who are deputized as police officers by local authorities, to bargain collectively with the employer through a union which also represents a separate bargaining unit of other employees of the same employer.

4. In failing to give any weight to the Board's determination and settled administrative policy that the bargaining pattern described in the pre-

ceding paragraph effectuates the policies of the Act, and in substituting its own judgment for that of the Board with respect to the propriety of such bargaining pattern.

5. In holding that, under Section 9 (b) of the Act, the Board is empowered to decide whether a union selected by a majority of employees is "appropriate."

6. In holding that the Board failed to give adequate consideration to the public interest in view of the war.

7. In setting aside and denying enforcement to the Board's order.

SUMMARY OF ARGUMENT

I

The Board properly determined that the plant guards here involved are employees within the meaning of Section 2 (3) of the Act. Except for their militarization and deputization, they differed in no respect from ordinary watchmen, patrolmen, gatemen, firemen and guards who for years have enjoyed membership in unions and coverage by collective bargaining contracts. They have no duties of a supervisory character. They have no subordinates. Their contact with production and maintenance employees is limited to reporting activities which injure the plant, its equipment or personnel as, for instance, theft or sabotage. Membership of plant guards in a union will in no wise jeopardize the full freedom of

any other employee to join or not join a union. Nor does membership of a plant guard in a union subject the employer to any risk of being held for acts of a guard on the ground that they jeopardize the neutral position the employer must maintain as to the production and maintenance employees in regard to all matters of organizational activity. It has never been held that an employer vests in a guard any economic power by reason of which an employer is to be deemed guilty of an unfair labor practice because of any anti-union or pro-union conduct of a guard unless that conduct was shown to have been authorized or ratified by the employer.

The plant guard is as much in need of collective bargaining as any employee who is concededly covered by the Act. There is nothing in his status as a guard which lends strength to his position when he bargains about his wages, hours or conditions of employment. His individual bargaining power is so weak that the employer, in effect, unilaterally fixes the terms of the bargain unless the guard resorts to self-organization and collective bargaining.

There is no reason to assume that statutory recognition of a plant guard's collective bargaining rights will make him less loyal to his employer in executing all legitimate tasks which his employer may assign him. The Board has certified unions as the collective bargaining representative of plant guards in several hundred cases over the past eleven years

without any evidence that any impairment of the employer's legitimate interests has resulted.

Militarization of the guards did not alter their status as employees of private employers nor does it remove the guards from the protection of the Act. The War Department regulations under which plant guards were enrolled as civilian auxiliaries of the military police were premised on the assumption that the guards remained in the employ of the civilian war contractor. The regulations expressly provided that hiring, dismissal and payment of wages remained a private matter between the guard and his employer. They likewise provided that, except for one hour a week of military drill and except in the event of an emergency, all control of the militarized guard should be through the usual channels of plant supervision. And, finally, the regulations expressly provided that the guards retained the full right to bargain collectively with but one proviso: that the military preferred that the guards bargain as a *unit* separate from the production and maintenance employees. The regulations went on to say, however, that the bargaining for the guards might be carried on by the same trade *union* which represented the other employees.

There is nothing in the records in either the *Jones & Laughlin* case or the *Atkins* case to indicate that any departure from either the letter or the spirit of the War Department regulations

took place as respects the manner in which the militarization of the guards was effectuated in their plants. Although the respondent Atkins was required to enlarge its previous staff of four to six watchmen by recruiting some fifty additional guards, the employment of all the guards was effectuated through the respondent Atkins' personnel office. The respondent Atkins continued to determine unilaterally and without any direction from the military, the rate of pay of both its former watchmen who became civilian auxiliaries and the new employees hired to supplement the guard force. While the respondent Atkins delegated to its chief guard, a civilian, full power to set the hours of work for the guard force and to make promotions to supervisory positions on the force, he executed these duties without consulting the military. This delegation did not divest the respondent of any of the attributes of its status as employer of the guards. Nor did the fact that, except for several general orders from the military authorities, the chief guard was left by the higher supervisory personnel of the respondent Atkins to exercise plenary control over the guards, render the respondent Atkins any the less the employer of the guards.

Militarization did not make it improper for the guards in the *Jones & Laughlin* case to be represented in collective bargaining by the Steelworkers even though the Steelworkers also repre-

sented the production and maintenance employees of the respondent Jones & Laughlin. The Board gave full effect to the War Department regulations when it placed the guards in a unit separate from the unit of production and maintenance employees. This practice of the Board received the express endorsement of the War Department. Thus, in refusing to enforce the Board's order because the guards were represented by the same union as represented production and maintenance employees, the Circuit Court of Appeals for the Sixth Circuit failed to give proper weight to the administrative judgment not only of the National Labor Relations Board but also of the War Department. These two agencies both determined that the war effort would be furthered, not hindered, were militarized plant guards to be accorded the full rights of collective bargaining through the union of their own choice. The court also construed the National Labor Relations Act as empowering the Board or the courts to impose a limitation on the union which plant guards could choose. The Board does not believe that the Act can be so construed. The Act is explicit that employees are to be free to choose any representative they may desire.

Deputization of plant guards does not alter their status as private employees nor deprive them of the full right to bargain collectively through the same union as represents the employer's other employees. Courts have uniformly

recognized in other contexts that private guards do not lose their status as private employees when they become special police officers of the state or municipality by deputization. It is generally recognized that this practice is one which has grown up to enable employers to achieve greater power to protect their plants. But it has never been thought that the employer of the guard who became deputized should be able to avoid the full responsibilities of his position as an employer. The Board has consistently held that guards who were deputized retained all their rights under the Act. No feature of the deputization of guards is inconsistent with the exercise by guards of the rights of self-organization and collective bargaining.

II

Demilitarization did not render either the Board's orders or the questions presented in these cases moot. The orders are continuing. They direct the employers to bargain collectively. They can still operate. And in order to determine their validity it is necessary to decide whether the employers committed unfair labor practices by their refusals to bargain at a time when the guards were militarized.

III

In the *Jones & Laughlin* case, the court below should not have considered the issues arising out of the deputization of the guards and out of the

fact that while they were militarized they sought to bargain through the same union as represented other employees of their employer, because these issues were never presented to the Board as required by Section 10 (e) of the Act.

ARGUMENT

INTRODUCTION

Resort by plant guards to the National Labor Relations Board for protection in the exercise of their basic right to self-organization and collective bargaining has given rise, in numerous cases, to the question of whether the status and duties of plant guards as they affect production employees remove such guards from the ambit of the statutory definition of "employee" contained in Section 2 (3) of the Act; whether, because of such status or duties, plant guards, if deemed employees, are nevertheless to be denied the right to select as their bargaining representative the same labor organization which represents the employer's production employees; whether deputization of plant guards as special officers by local or state authorities, or militarization of such guards pursuant to the War Department program removes the guards from the protection of the Act or should result in curtailment of their freedom of choice of bargaining representatives. We believe, and shall argue below, that some of these questions are not properly presented in the instant cases. Nevertheless, in order that this Court may have a com-

plete picture of the status of plant guards under the National Labor Relations Act, we shall first discuss all of the questions on the merits.

I

THE BOARD COULD PROPERLY DETERMINE THAT THE PLANT GUARDS ARE EMPLOYEES OF THE RESPECTIVE COMPANIES WITHIN THE MEANING OF THE ACT

A. ABSENT MILITARIZATION AND DEPUTIZATION, THE BOARD COULD PROPERLY FIND THAT PLANT GUARDS ARE "EMPLOYEES" WITHIN THE MEANING OF SECTION 2 (3)

The records in the instant cases show that the persons included within the units found appropriate perform only the usual functions of gatemen, patrolmen, watchmen, guards and firemen.[12] In the *Jones & Laughlin* case, the unit includes only "patrolmen", "watchmen", "firemen", and "dump laborers" and excludes "lieutenants, captains and supervisors" (*Jones*, R. 54). It is conceded that the sole duty of those in the unit is to protect plant and property (*Jones*, R. 8–10). In the *Atkins* case, the unit includes only "plant guards" and excludes "the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, or effectively recommend such action" (*Atkins*, R. 7). The testimony shows that some of these plant guards perform the functions of gatemen for they inspect all persons, vehicles and packages going into or coming

[12] Compare the definitions from the Dictionary of Occupational Titles set forth in Appendix C, *infra*, pp. 160–162. See also *The Watchman's Handbook*, published by the American District Telegraph Co. (New York, 1940).

out of the plants (*Atkins*, 52–53, 62, 76–77), while others of the guards perform such duties as carrying cash to different parts of the plant and maintaining general surveillance over the plant and property to detect fires and suspicious circumstances and to prevent sabotage (*Atkins*, R. 52, 80, 88). Persons performing such duties have for years been members of various labor unions. In the building trades, the American Federation of Labor has treated watchmen and guards as part of the craft included within the jurisdiction of the International Hod Carriers', Building and Common Laborers' Union of America.[13]

Outside of the building trades, the American Federation of Labor has conferred jurisdiction on the Building Service Employees' International Union of "Watchmen and Guards in buildings and industrial plants, including those used for fire prevention."[14] The National Association of Post Office and Railway Mail Laborers, A. F. of L., has jurisdiction of "any person in the postal service classified as a watchman."[15] The Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, A. F. of L., has jurisdiction of "guards" and "watchmen" employed by electric or motor transportation systems.[16] The unions which organize on an indus-

[13] Florence Peterson, *Handbook of American Labor Unions* (1944), pp. 163–164.

[14] *Id.* at p. 73.

[15] *Id.* at p. 293.

[16] *Id.* at p. 368.

trial basis usually include watchmen and guards along with the production, maintenance and other employees, without specific reference to these groups in their constitutions.[17] The National Labor Relations Board, in more than a hundred cases, has expressly included guards or watchmen in units of production and maintenance employees.[18] In those cases in which the Board has excluded guards or watchmen from such units, it has been out of deference to the union's wishes and

[17] See *Matter of Sweet Candy Co.*, 5 N. L. R. B. 541, 542. However, the Tobacco Workers International Union, A. F. of L., expressly lists "watchmen" in its constitutional definition of its jurisdiction. Peterson, *op. cit.*, at pp. 383, 384. The only union not affiliated with the American Federation of Labor, other than those whose membership is limited to one employer, which expressly mentions watchmen or guards in its constitution is the International Airline Mechanics Association, Independent, which includes "guards." *Id.* at p. 18.

[18] *Matter of Westinghouse Airbrake Co.*, 4 N. L. R. B. 403, 408; *Matter of Sweet Candy Co.*, 5 N. L. R. B. 541, 544; *Matter of J. G. McDonald Chocolate Co.*, 5 N. L. R. B. 547, 550; *Matter of Holland Reiger Division of Apex Electric Co.*, 6 N. L. R. B. 156, 158–159; *Matter of American Hair & Felt Co.*, 6 N. L. R. B. 648, 651–652; *Matter of Singer Mfg. Co.*, 8 N. L. R. B. 434, 437; *Matter of Aluminum Ore Co.*, 8 N. L. R. B. 914, 917; *Matter of Clifton Mfg. Co.*, 9 N. L. R. B. 13, 16; *Matter of The Electric Auto-Lite Co.*, 9 N. L. R. B. 147, 151, 153; *Matter of Merrimack Mfg. Co.*, 9 N. L. R. B. 173, 177; *Matter of A. Fink and Sons Co., Inc.*, 9 N. L. R. B. 441, 444; *Matter of Consumers Power Co.*, 9 N. L. R. B. 742, 748, 749; *Matter of Alaska Juneau Gold Mining Co.*, 9 N. L. R. B. 755, 758; *Matter of Lincoln Mills of Alabama*, 9 N. L. R. B. 778, 780; *Matter of Willys Overland Motors, Inc.*, 9 N. L. R. B. 924, 931–933; *Matter of Pacific Mills*, 10 N. L. R. B. 26, 30; *Matter of Libbey-Owens-Ford Glass Co.*, 10 N. L. R. B. 1470, 1473, 1478; *Matter of Illinois Knitting*

Co., 11 N. L. R. B. 48, 52; *Matter of Hawthorne Paper Co.*, 12 N. L. R. B. 43, 45; *Matter of American Petroleum Co.*, 12 N. L. R. B. 688, 713; *Matter of Ohio Brass Co.*, 13 N. L. R. B. 72, 76; *Matter of Naumkeag Steam Cotton Co.*, 13 N. L. R. B. 513, 518–520; *Matter of Vanadium Corp. of America*, 13 N. L. R. B. 836, 839; *Matter of La Plant-Choate Mfg. Co., Inc.*, 13 N. L. R. B. 1228, 1231; *Matter of Coos Bay Lumber Co.*, 14 N. L. R. B. 1206, 1211; *Matter of Armour & Co.*, 15 N. L. R. B. 268, 273, 275; *Matter of Kelsey Hayes Wheel Co.*, 16 N. L. R. B. 580, 582–583; *Matter of Newark Rivet Works*, 18 N. L. R. B. 520, 523; *Matter of Theuer Wagon Works, Inc.*, 18 N. L. R. B. 837, 850; *Matter of Blue Bell-Globe Mfg. Co.*, 22 N. L. R. B. 961, 964; *Matter of French Paper Co.*, 22 N. L. R. B. 1054, 1056; *Matter of Brown Shoe Co., Inc.*, 22 N. L. R. B. 1080, 1091–1092; *Matter of Westinghouse Electric & Mfg. Co.*, 23 N. L. R. B. 521, 523; *Matter of West Kentucky Coal Co.*, 24 N. L. R. B. 863, 869–870; *Matter of Lee Rubber & Tire Corp.*, 24 N. L. R. B. 1077, 1082; *Matter of Gettysburg Furniture Co.*, 25 N. L. R. B. 1109, 1112–1114; *Matter of Moulton Ladder Mfg. Co.*, 27 N. L. R. B. 40, 42–43; *Matter of Rickert Rice Mills, Inc.*, 27 N. L. R. B. 466, 468–469; *Matter of Eagle Oil & Refining Co.*, 27 N. L. R. B. 1003, 1007; *Matter of American Cyanamid Co.*, 27 N. L. R. B. 1176, 1178, 1181; *Matter of Southern Cement Co.*, 28 N. L. R. B. 596, 598; *Matter of Shaw Lumber Co.*, 28 N. L. R. B. 818, 822–823; *Matter of Saticoy Lemon Ass'n*, 28 N. L. R. B. 1214, 1216; *Matter of Solvay Process Co.*, 29 N. L. R. B. 24, 28, 31; *Matter of Trojan Powder Co.*, 29 N. L. R. B. 229, 232–233; *Matter of Pullman-Standard Car Co.*, 29 N. L. R. B. 600, 602–603; *Matter of Gutmann & Co., Inc.*, 30 N. L. R. B. 1, 4; *Matter of Continental Mills*, 30 N. L. R. B. 82, 84–85; *Matter of Mary Leila Cotton Mills, Inc.*, 30 N. L. R. B. 238, 240; *Matter of Solvay-Process Co.*, 30 N. L. R. B. 264, 266; *Matter of National Copper and Smelting Co.*, 30 N. L. R. B. 973, 975–976; *Matter of Goodrich Electric Co., Inc.*, 30 N. L. R. B. 979, 982; *Matter of Libby-Owens-Ford Glass Co.*, 31 N. L. R. B. 243, 248; *Matter of General Chemical Co.*, 31 N. L. R. B. 413, 416; *Matter of Mack-International Motor Truck Corp.*, 31 N. L. R. B. 424, 428; *Matter of Moulton*

Ladder Mfg. Co., 31 N. L. R. B. 665, 668; *Matter of American Cyanamid & Chemical Corp.*, 31 N. L. R. B. 883, 885; *Matter of Westinghouse Electric & Mfg. Co.*, 32 N. L. R. B. 274, 276; *Matter of The Quaker Oats Co.*, 32 N. L. R. B. 312, 315–316; *Matter of Jerry and Edythe Belanger*, 32 N. L. R. B. 1276, 1278–1279; *Matter of Robins Dry Dock & Repair Co.*, 33 N. L. R. B. 15, 18–19; *Matter of Whiterock Quarries, Inc.*, 33 N. L. R. B. 145, 147; *Matter of Turner Day and Woolworth Handle Co., Inc.*, 33 N. L. R. B. 1220, 1222–1223; *Matter of Bryce Brothers Co.*, 34 N. L. R. B. 255, 257; *Matter of The Lehon Co.*, 34 N. L. R. B. 313, 315–316; *Matter of Sullivan Mining Co.*, 36 N. L. R. B. 107, 110–113; *Matter of Tucker Duck & Rubber Co., Inc.*, 36 N. L. R. B. 132, 134, 136; *Matter of Ideal Seating Co.*, 36 N. L. R. B. 166, 168; *Matter of Houde Engineering Corp.*, 36 N. L. R. B. 587, 590; *Matter of Arkwright Corp.*, 36 N. L. R. B. 687, 691; *Matter of Fruit Growers Supply Co.*, 36 N. L. R. B. 959, 961; *Matter of Indiana Brass Co.*, 36 N. L. R. B. 966, 970; *Matter of Sculler Safety Corp.*, 36 N. L. R. B. 1160, 1162; *Matter of John Yasek*, 37 N. L. R. B. 156, 158, 160; *Matter of Buxton Dixie Corp.*, 37 N. L. R. B. 432, 434; *Matter of Diamond Crystal Salt Division of General Foods Corp.*, 37 N. L. R. B. 481, 484; *Matter of F. M. Bohannon Tobacco Co.*, 37 N. L. R. B. 526, 528; *Matter of Peerless Novelty Co.*, 37 N. L. R. B. 622, 624; *Matter of Link-Belt Speeder Co.*, 37 N. L. R. B. 889, 891–892; *Matter of The Edward Valve & Mfg. Co.*, 38 N. L. R. B. 428, 431; *Matter of South Portland Shipbuilding Corp.*, 39 N. L. R. B. 485, 487; *Matter of MacAndrews & Forbes Co.*, 39 N. L. R. B. 699, 703–704; *Matter of Philip Carey Mfg. Co.*, 39 N. L. R. B. 769, 772–773; *Matter of Little Rock Furniture Mfg. Co.*, 39 N. L. R. B. 892, 894; *Matter of Superior Coach Corp.*, 39 N. L. R. B. 926, 931; *Matter of Pacific Gas & Electric Co.*, 40 N. L. R. B. 591, 603–604; *Matter of Republic Creosoting Co.*, 40 N. L. R. B. 615, 617–618; *Matter of American Brake Shoe & Foundry Co.*, 41 N. L. R. B. 82, 84; *Matter of Farmington Shoe Mfg. Co.*, 41 N. L. R. B. 169, 170; *Matter of Gibbs Gas Engine Co.*, 42 N. L. R. B. 272, 276–277; *Matter of Lookout Oil & Refining Co.*, 42 N. L. R. B. 560, 562–563; *Matter of Flintkote Co.*, 42 N. L. R. B. 929, 931–932; *Matter of McKesson & Robbins*,

often over the objection of the employer.[19] In a number of other cases, the Board has found the employer guilty of an unfair labor practice because of discriminatory discharges of guards or watchmen.[20] In none of these cases was it even contended that

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Inc., 42 N. L. R. B. 1297, 1299; *Matter of New Indiana Chair Co.*, 43 N. L. R. B. 318, 319–320; *Matter of Baer Bros.*, 43 N. L. R. B. 1267, 1269; *Matter of A. P. Steiner*, 42 N. L. R. B. 1384, 1387; *Matter of Luders Marine Construction Co.*, 44 N. L. R. B. 214, 216; *Matter of Hamrick Mills*, 44 N. L. R. B. 238, 239–241; *Matter of Farrar & Trefts, Inc.*, 44 N. L. R. B. 678, 679; *Matter of North Carolina Finishing Co.*, 44 N. L. R. B. 681, 684; *Matter of Colorado Portland Cement Co.*, 45 N. L. R. B. 197, 199; *Matter of Gluck Bros., Inc.*, 45 N. L. R. B. 1159, 1161; *Matter of Bell Telephone Laboratories* 55 N. L. R. B. 87, 89–90; *Matter of Commonwealth Edison Co.*, 55 N. L. R. B. 732, 733; *Matter of Luscombe Airplane Corp.* 69 N. L. R. B. 479, 481, 482; *Matter of E. I. duPont de Nemours & Co.*, 69 N. L. R. B. 509, 519.

[19] *Matter of Federal Fibre Mills*, 15 N. L. R. B. 256, 259; *Matter of American Tobacco Co.*, 2 N. L. R. B. 198, 205, 206; *Matter of General Mills, Inc.*, 3 N. L. R. B. 730, 738; *Matter of International Harvester Co.*, 5 N. L. R. B. 192, 197; *Matter of Woodside Cotton Mills Co.*, 7 N. L. R. B. 960, 962; *Matter of Yates-American Machine Co.*, 10 N. L. R. B. 786, 789; *Matter of Burton Dixie Corp.*, 10 N. L. R. B. 1417, 1419; *Matter of Cayuga Linen & Cotton Mills, Inc.*, 11 N. L. R. B. 1, 3; *Matter of Bethlehem Shipbuilding Corp.*, 11 N. L. R. B. 105, 137; *Matter of Automotive Maintenance Machinery Co.*, 13 N. L. R. B. 338, 349–350; *Matter of Bremner Bros.*, 39 N. L. R. B. 763, 765.

[20] *Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440, 458–459, 467–468, 478–479, 480–481, 488–489; *Matter of Lansing Co.*, 20 N. L. R. B. 434, 444–445; *Matter of Budd Wheel Co.*, 49 N. L. R. B. 1350; *Matter of Tampa Shipbuilding Co.*, 50 N. L. R. B. 177; *Matter of Ford Motor Co.*, 50 N. L. R. B. 534; *Matter of Zenith Optical Co.*, 53 N. L. R. B. 252, 270; *Matter of Ingalls Iron Works Co.*, 58 N. L. R. B. 1202

guards or watchmen were not employees within the meaning of the Act.

In the iron and steel industry, the Steelworkers, in establishing its first bargaining relationships, did not include watchmen or guards within the unit of production and maintenance employees which it sought to represent. The contracts between the respondent Jones and Laughlin and the Steelworkers (*Jones*, R. 13, 16–32), and between the respondent Atkins and the Steelworkers (*Atkins*, R. 86–87, 162–171), excluding from their coverage plant protection employees, represent the typical situation in the steel industry.[21] The explanation for this development can probably be found in Board cases which showed that many companies in this industry in 1936 and 1937 used their guards for anti-

[21] *Matter of Pittsburgh Steel Co.*, 1 N. L. R. B. 256, 263; *Matter of Crucible Steel Co.*, 1 N. L. R. B. 545; *Matter of Bendix Products Corp.*, 1 N. L. R. B. 173; *Matter of Crucible Steel Co.*, 2 N. L. R. B. 298, 304–305; *Matter of Interlake Iron Corp.*, 2 N. L. R. B. 1036, 1039–1041; *Matter of The Greer Steel Co.*, 4 N. L. R. B. 333, 336; *Matter of R. C. Mahon Co.*, 5 N. L. R. B. 257, 260; *Matter of Interlake Iron Corp.*, 6 N. L. R. B. 780, 785–786; *Matter of Calumet Steel Division of Borg-Warner Corp.*, 7 N. L. R. B. 340, 345–346; *Matter of Burnside Steel Foundry Co.*, 7 N. L. R. B. 714, 718–720; *Matter of Moline Iron Works*, 9 N. L. R. B. 664, 670; *Matter of Calumet Steel Division of Borg-Warner Corp.*, 23 N. L. R. B. 114, 126–127; *Matter of Virginia Bridge Co.*, 29 N. L. R. B. 241, 243; *Matter of The Colorado Fuel & Iron Corp.*, 29 N. L. R. B. 541, 544. In the following case the exclusion of watchmen from the unit was objected to by the employer: *Matter of Inland Steel Co.*, 9 N. L. R. B. 783, 788–790.

union purposes.[22] As time has begun to erase the bitter feelings of those days, we find the guards in steel joining the Steelworkers,[23] or oth[illegible] unions.[24]

The respondent Jones & Laughlin, in its motion to dismiss the petition for certification and in its exceptions to the intermediate report, took the position that the members of its plant protection force are part of management and therefore employers within the meaning of Section 2 (2) of the Act instead of employees within the meaning of Section 2 (3) of the Act (*Jones*, R. 5–8, 69–70). It offered no evidence, however, to show what, if any duties, its patrolmen, watchmen, firemen and dump laborers had which made them a part of management. Indeed, plant

[22] See *Matter of Jones & Laughlin Steel Corp.*, 1 N. L. R. B. 502, 511, 512, enforced, 301 U. S. 1; *Matter of Republic Steel Corp.*, 9 N. L. R. B. 219, 240–241, 262, 360–362, 368, 373–374, enforced 107 F. 2d 472 (C. C. A. 3), certiorari denied, 309 U. S. 684; *Matter of Weirton Steel Corp.*, 32 N. L. R. B. 1145, 1163–1175, enforced, 135 F. 2d 494 (C. C. A. 3); *Matter of American Rolling Mill Co.*, 43 N. L. R. B. 1020, 1058–1060.

[23] Besides the instant *Jones & Laughlin* case, see *Matter of Bethlehem Steel Co.*, 46 N. L. R. B. 794; *Matter of Youngstown Sheet & Tube Co.*, 47 N. L. R. B. 391; *Matter of Pressed Steel Car Co.*, 47 N. L. R. B. 425; *Matter of Consolidated Steel Corp.*, 51 N. L. R. B. 333; *Matter of American Steel & Wire Co.*, 51 N. L. R. B. 440; *Matter of American Steel Foundries*, 52 N. L. R. B. 432.

[24] Besides the instant *Atkins* case, see *Matter of American Forge Co.*, 44 N. L. R. B. 826; *Matter of Bethlehem Steel Corp.*, 47 N. L. R. B. 1330.

guards, unlike supervisors, have no power whatever to hire or discharge other employees, or to recommend such action. They have no authority to direct or determine the efficiency, capability or skill of production and maintenance employees. They neither assign work to employees nor pass upon the quality of their performance. They have no subordinates. Their sole duty with reference to other employees is to report instances of acts injurious to plant or personnel such as theft or sabotage (*Jones*, R. 8–10). Their function is in this respect purely reportorial, involving neither the exercise of discretion nor the imposition of punishment. And even the violations which they must report are of a quite flagrant nature, requiring in most instances conduct so clearly wrong as to make it unlikely that the guard would have to make any "close" decisions.

Since, therefore, employers do not vest in plant guards, as they do in foremen and other supervisors, the power to affect the wages, hours, working conditions or tenure of employment of other employees, it has never been held that the fact of the guards' membership or activity in a union would even tend to subvert the will of any production or maintenance employee in regard to the exercise by the latter of his own rights of self-organization. No employee's freedom to join or not join a union is jeopardized. It has been held that employers are not responsible for the conduct

of plant guards in forming, joining or assisting labor organizations among production employees, unless such conduct is shown to have been authorized or ratified by the employer.[25] As was pointed out in *Matter of Dravo Corporation*, 52 N. L. R. B. 322, 326–327, the Board

> has never held that the acts of plant guards are unfair labor practices which can be imputed to an employer in the absence of circumstances indicating that the employer authorized or ratified the conduct in question. In this respect, guards and other plant-protection employees are quite different from foremen or other supervisory personnel.

It cannot be contended, as the Board noted in *Matter of Budd Wheel Company*, 52 N. L. R. B. 666, 669,[26] that:

> management requires the services of plant-protection employees at the conference table; or that management would on the one hand be compelled to bargain with its plant-protection force as employees, and would on the other hand be held responsible under the Act for actions of plant-protection employees in encouraging or dis-

[25] *Fentress Coal & Coke Co.*, 44 N. L. R. B. 1033, 1038–1040; *Matter of Wilson & Co., Inc.*, 63 N. L. R. B. 636, 637, n. 2, 638–639.

[26] See also, e. g., *Matter of Aluminum Company of America*, 50 N. L. R. B. 963, 966; *Matter of Maryland Drydock Company*, 50 N. L. R. B. 363, 369; *Matter of Federal Motor Truck Company*, 50 N. L. R. B. 214, 216–217.

couraging employee organization; or that the position of plant-protection employees in the plant set-up is sufficiently dominant like that of supervisory employees so that their participation in collective bargaining would unduly influence the full freedom of choice of the rank and file employees which the Act guarantees.

1. *The premises of the Act, as applied to the facts of the economic relation between plant guards and employers, requires that plant guards be held to be "employees" within the meaning of the Act.*—There can be no question but that rank and file plant guards, like rank and file maintenance or production employees, are included within the statutory definition of "employee" contained in Section 2 (3) of the Act. That the typical relationship between plant guards and plant management is that of employee and employer is a proposition made plain by what has already been said. See *supra*, pp. 45–53. And certainly, the purposes of the Act, in the light of which the term "employee" must be read (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 129), are as applicable to plant guards as to employees who perform other duties. Absent collective bargaining, the plant guard-employer relation is characterized by the same inequality of bargaining power, the same unilateral employer determination of wages, hours, and working conditions, and the

same need for collective action by the guards to secure an effective voice in the determination of their terms and conditions of employment, which characterizes modern employer-employee relations generally. The same provocations to dispute inhere in employer refusals to recognize the right of guards to organize for collective bargaining and to bargain with their freely chosen representatives as inhere in employer refusals to recognize the bargaining rights of employees engaged in other trades or crafts. The dual objectives of the Act, equalization of bargaining power by promoting self-organization, and elimination of strikes which interfere with the free flow of commerce by substituting the duty to bargain collectively for the power to resist collective bargaining which leaves employees no recourse but to strike, are therefore completely obtainable here.

These propositions, indeed, have never been challenged since the earliest days of the Act when the Board first held that plant guards, who had organized for the purposes of collective bargaining, were entitled to the Act's protection. *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181 (August 31, 1936). Employers who oppose the extension of collective bargaining protection to plant guards have never denied that guards can no more deal individually on a basis of equality with their employer concerning their wages, hours,

and working conditions than can those categories of employees who are admittedly covered by the Act.

2. *Statutory protection of the right of plant guards to organize and bargain collectively does not jeopardize the employer's interest in faithful performance by the guards of all legitimate tasks assigned to them.*—From the very beginning, the sole contention of those employers who would deny plant guards the protection of the Act has been that if guards organize and seek to bargain collectively, they become subject to conflicting claims upon their loyalty which will prevent them from properly performing their duties. We have shown in our brief in *Packard Motor Car Co.* v. *National Labor Relations Board,* No. 658, this Term, 1946, pp. 66–87, that the duties of foremen are not inconsistent with their membership in a union and bargaining collectively through it. Everything there said is at least equally true as applied to a plant guard who has neither the continuous nor the close and direct relationship with production and maintenance employees which a foreman has. The duties of a plant guard as shown by the records in these cases do not impose on him any relationship with other employees different from the guards' relationship to non-employees. The guard must report all persons who steal, commit breaches of the peace or otherwise endanger the safety of plant and personnel.

Non-employees or supervisory employees, as well as rank and file employees, must be reported without distinction (Cf *Atkins*, R. 80).

The Board's experience for the past eleven years demonstrates that self-organization and collective bargaining by plant guards do not jeopardize legitimate employer interests in plant protection. Thus in several of the cases which have come before the Board, employers attempted to prove that when plant guards joined a union they became less attentive to duty and were, for example, loathe to report incidents of wrongdoing where fellow unionists were concerned. The allegation was never proved. For example, the employer made this argument in the very first case, in which a union sought to be certified as the representative of a unit including plant guards, *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181, 188–189 (August 31, 1936). But the evidence introduced in support of the allegation disproved rather than proved it. As the Board pointed out "the only specific instance [of alleged inefficiency attributed to a plant guard's union affiliation] testified to was one where a watchman who was a member of the Union had promptly reported to his employer * * * the case of a longshoreman whom he had detected pilfering." 2 N. L. R. B., at 188. The Board thereafter had occasion to observe the effect of collective bargaining by these guards upon the employer's legitimate interests in faith-

ful performance. After the Board's certification of a local of the International Longshoremen's Association as bargaining representative for the plant guards and miscellaneous waterfront workers, a majority of the employers involved in the *Luckenbach* case entered into a contract with the local covering both guards and other miscellaneous waterfront employees. In a subsequent proceeding under Section 10 of the Act, brought against those employers who had refused to honor the certification, the Board noted that although a year had elapsed since execution of the contract between the other employers and the Union, no attempt was made to show that "the operation of that agreement has not been satisfactory." *Matter of American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355, 1362–1365 (January 21, 1939).

Moreover, in many of the cases which have come before the Board the plant guards had bargained collectively with management through the same union which represented the production employees for several years prior to the Board's decision, and the employers involved did not contend that their union affiliation had impaired their usefulness. See, *e. g. Matter of Curtiss-Wright Corp.*, 33 N. L. R. B. 490, 495–496; *Matter of Houde Engineering Corp.*, 36 N. L. R. B. 587; *Matter of Arkwright Corp.*, 36 N. L. R. B. 687; *Matter of The National Supply Co.*, 57 N. L. R. B. 194, 195.

Between 1936 and 1942, despite the more than a hundred certifications of unions for plant guards issued by the Board during that period (see n. 18, pp. 47–50, *supra*), not a single employer contested a Board order to bargain with representatives of plant guards in the courts, and in only one case (*American-Hawaiian*) did an employer refuse to honor a Board certification of a union as bargaining representative because the unit was composed in whole or part of plant guards.

The Board does not believe that under present conditions in industry and collective bargaining, plant guards normally perform any legitimate duties which will be jeopardized by protecting their right to organize and bargain collectively. It is unfortunately true that all too often in the past employers have used plant guards as industrial spies or strong-arm men in fighting unions.[27] The Board has held that an employer violates Section 8 (1) and (3) of the Act by imposing upon a guard such duties and by discharging him for failure to perform them. Thus the Board has held that an employer may not require a guard to spy upon a union meeting or

[27] These activities have been fully investigated and described by the La Follette Committee. Sen. Rep. No. 6, 76th Cong., 1st Sess., Violations of Free Speech and Rights of Labor, Report: *Private Police Systems*, Pt. 2, p. 11; 84 Cong. Rec. 3397–3398; Horace B. Davis, *Industrial Policing*, Encyclopoedia of the Social Sciences, vol. 12, pp. 193–196; Wilbert E. Moore, *Industrial Relations and the Social Order* (1946), pp. 405–406. See also n. 22, p. 52, *supra*.

report what occurred [28] and that he may not order a guard to prevent union organizers from lawfully distributing union literature on the street in front of the plant." [29] We do not believe that any employer would today openly argue that guards should be denied the protection of the Act because the employer should be able to exact such duties of plant guards.

The situation which employers chiefly urge as presenting conflicting loyalties for plant guards is the instance of a strike. In the *Luckenbach* case the Board pointed out (2 N. L. R. B., at 188–189): "The contention of the employers that the watchmen would in the event of a strike join the strikers is perhaps well-founded, but the inconvenience suffered by the employers in such a case differs only in degree from the inconvenience suffered when any other type of employee goes on strike. In addition, the testimony shows that at the time of a strike of the ship's clerks employed by Luckenbach Steamship Company, Inc., although the watchmen joined in the strike on the instruction of the striking unions, some of the watchmen remained on duty until the docks were cleared and the companies had secured other watchmen." Unions generally are anxious to provide a guard and maintenance force to

[28] *Matter of Budd Wheel Co.*, 49 N. L. R. B. 1350, 1356. Cf. *In re Brewster Aeronautical Corp.*, 15 War Lab. Rep. 239, 244.

[29] *Matter of Zenith Optical Co.*, 53 N. L. R. B. 252, 270–271.

protect the property in the event of a strike so long as no attempt is made to restore production. Indeed, in defining a strike one author mentions this practice as a constituent feature of a strike.[30]

Labor organizations fully recognize the impropriety of making demands upon their members which are in any sense incompatible with the employees' loyal and faithful performance of duties to the employer. Thus collective agreements negotiated between representatives of plant guards and employers illustrate that management's fears that labor organizations will require employees to use their positions to further union interests rather than the interests of the employer are easily dispelled in the terms of the ultimate bargain.

In a number of typical contracts which are reprinted as Appendix B of our brief in the *Packard* case, No. 658, this Term, pp. 123–131, see also, *Jones,* R. 94–95, 101–106, 132–134; *Atkins,* R. 297–304, unions of production workers which represent plant guards agree that the guards must perform their assigned duties "impartially and without regard to any union or non-union affilia-

[30] S. Howard Patterson, *Social Aspects of Industry* (1943), pp. 390–391. Cf. *Matter of Lansing Co.*, 20 N. L. R. B. 434, 444–445; Arthur E. Suffern, *The Coal Miners' Struggle for Industrial Status* (1926), pp. 315–316; Department of Labor, Bureau of Labor Statistics, Bull. No. 686, *Union Agreement Provisions* (1942), pp. 166–167; Bureau of National Affairs, Inc., *Collective Bargaining Negotiations and Contracts*, Part II (1945), pp. 77:1, 77:11, 77:901, 77:902.

tion or activities" (*e. g., Jones,* R. 102, 103, 105, 106). They agree that guards must hold in strict confidence any confidential information which they may acquire (*e. g., Jones,* 102, 104, 106). Finally, such unions undertake that in the event of a strike by production workers, the plant guards shall continue to report for duty, remain at their posts and discharge their assigned duties in the usual manner (*e. g., Jones,* R. 102, 103, 104, 105, 106, 132, 133, 134). This undertaking is particularly significant since the guards agree to refrain from exercising their economic power to compel the employer to comply with wage, hour, or other working condition demands, in deference to the employer's interest in maintaining continuous protection of his property at all times. Such a waiver by the guards of their right to strike is appropriate, of course, only where the guards may feel that their interests in dealing with the employer are adequately protected by a representative of the guards' own choosing. Thus collective bargaining facilitates rather than obstructs accomplishment of the legitimate objectives of plant security.

This is not to say that no union or no employer would ever make an improper demand upon a plant guard. Nor is it to say that no plant guard would ever succumb to such a demand. We do say, however, that experience has shown that normally the respective areas of legitimate union

and employer interests are easily discernible, are quickly agreed upon by unions, employers and plant guards, and are respected by all the parties. Under these circumstances there could be no excuse for a rule of law which presumed that plant guards would act improperly at the instance of either employer or union, thereby reversing the normal presumption of innocence which characterizes our jurisprudence as a whole. As in other fields of the law, the occasional defection must be treated as an individual matter and punished as such.

There have been no indications from any source that a sanction imposed only in instances of actual failure to perform the tasks assigned, has proved inadequate to cope with the dangers employers fear. And this is not surprising. For apart from the influences which in any event would induce a plant guard faithfully to perform the duties entrusted to him, such as the desire to preserve the property upon which his livelihood depends, realization that inattention to duty may cost his job is entirely sufficient to assure that the guard will not succumb to any temptation to view with a distorted eye the obligations he owes to the union.

B. MILITARIZATION DID NOT ALTER THE STATUS OF PLANT GUARDS AS EMPLOYEES OF PRIVATE EMPLOYERS OR REMOVE PLANT GUARDS FROM THE PROTECTION OF THE ACT

1. *Militarization did not remove plant guards from the category of "employees" covered by Section 2 (3) of the Act.*—The plant guard forces

here involved were enrolled as civilian auxiliaries to the military police under regulations issued by the War Department pursuant to the President's Executive Order No. 8972, issued on December 12, 1941 (*Atkins*, R. 105, 344–345, Appendix B, *infra*, pp. 134–160). The controlling regulations in effect at all times material in the instant cases are the basic directive of July 2, 1942 (Appendix B, *infra*, pp. 157–160) together with supplementary regulations issued by the War Department on March 17, 1943 (Appendix B, *infra*, pp. 134–157).[21] These regulations stated the purpose of incorporating plant guard forces as a civilian auxiliary to the military police, defined the obligations which guards, as civilian auxiliaries, would owe to the Government, and detailed the effect of civilian auxiliary status upon the status of plant guards as employees of private companies. As stated in the regulations, the purpose of subjecting plant guards to military control was "to increase the authority, efficiency, and responsibility of guard forces at plants im-

[21] The record in the *Atkins* case contains a version of these regulations issued by the Continuous Security District Office of the War Department located in Cincinnati (*Atkins*, R. 58–60, 105–112). Since this is not complete, we have printed the full regulations as Appendix B to this brief, pp. 134–160, *infra*. In the following summary of the provisions of these regulations we refer first to the page in the Appendix where the full regulation is printed and thereafter to the page of the *Atkins* record where the version issued by the District Office of the War Department is set forth.

portant to the prosecution of the war" (Appendix B, *infra*, pp. 134–135, *Atkins*, R. 105–106).

Responsibility "for providing adequate protection at all times against all hazards" was not assumed by the Government but was expressly imposed upon "plant managements" (Appendix B, *infra*, p. 135, *Atkins*, R. 106). As the record in the *Atkins* case shows (*Atkins*, R. 88–89, 82), employers who desired to obtain government contracts for the production of war materials were required to provide "adequate protection" for the plant where the materials were to be produced, by causing existing plant protection employees to enroll as civilian auxiliaries and, where necessary, by recruiting additional employees who would likewise enroll as civilian auxiliaries to expand its plant protection force (cf. Appendix B, *infra*, pp. 135–137, 140–143, 144–145, 148–152, *Atkins*, R. 105–108). As in the case of other occupations deemed by military authorities to bear an intimate relation to national security, contractors were required to secure the approval of the Secretary of War before hiring an alien as a plant guard (Appendix B, *infra*, p. 137, *Atkins*, R. 107), and military authorities reserved the right to veto the hiring or dismissal of a plant guard, if such action by the contractor would result in impairment of the efficiency of the guard force (Appendix B, *infra*, p. 145, *Atkins*, R. 109). Control over "the performance by the guard forces of its ordinary

protective duties" even after "militarization" was left exclusively in the hands of private plant managements and their own civilian guard chiefs (Appendix B, *infra*, pp. 135, 141, 144, *Atkins*, R. 108–109). Nevertheless, because the Government was "directly interested in the security and protection of the plant and its production as essential to the successful prosecution of the war" (Appendix B, *infra*, p. 141, *Atkins*, R. 108), military plant guard officers were authorized to take appropriate action "through the plant management" (Appendix B, *infra*, p. 135, *Atkins*, R. 106) to correct conditions which might result in "defective or inadequate performance by the plant guard forces of its ordinary protective duties" (*ibid.*).

The function of the guard forces as civilian auxiliaries to the military police was stated as follows: "to provide internal and external protection of the plant against sabotage, espionage, and natural hazards [and] to serve with the Army in providing protection to the plant and its environs in emergency situations" (Appendix B, *infra*, pp. 135–136, *Atkins*, R. 106). To effectuate this purpose, military plant guard officers were authorized to exercise direct control over the guard forces "only in matters relating to military instruction and duties as auxiliary military police" (Appendix B, *infra*, pp. 141, 144, *Atkins*, R. 109), and even with respect to such matters it

was provided that, "except at drill and except in emergency situations" orders of miltary plant guard officers should be issued "through the chain of command established by the plant management" and "only after consultation with and, if possible, concurrence by the plant management" (Appendix B, *infra*, pp. 143, 144, *Atkins*, R. 108–109). The regulations provide that the military training should not exceed one hour per week "except with the approval of the plant management" (Appendix B, *infra*, p. 152, *Atkins*, R. 111).

The status of plant guards as employees of the companies which employ them is specifically recognized and preserved. The agreement with the United States, which plant guards were required to execute upon becoming members of the civilian auxiliary to the military police (*Jones*, R. 7; *Atkins*, R. 54–55, 103–104), as the Board found (*Atkins*, R. 31), unmistakably rests upon and presupposes a private contract of employment between the guard and a civilian employer. Throughout the War Department regulations, guards who are members of the civilian auxiliary are referred to as private employees (Appendix B, *infra*, pp. 136, 137, 144, 145, 146, 147–148, 159, 160, *Atkins*, R. 107, 108, 109, 110). With respect to "employer-employee relationship," the the regulations provide that "militarization of plant guard forces does not change the existing systems of hiring, compensation, and dis-

missal; all remain primarily a matter between the guards and the plant managements [and] guards in the employ of a private employer may, as heretofore, be dismissed by that employer * * *" (Appendix B, *infra,* pp. 144–145, *Atkins,* R. 109). With respect to "control" the regulations make it clear that the plant guards "will continue to function as formerly" and that "control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations" (Appendix B, *infra,* p. 144, *Atkins,* R. 108–109). The regulations further provide that "the plant management continues to be charged with the training of its guard forces in their ordinary protective duties" (Appendix B, *infra,* p. 152, *Atkins,* R. 111). Plant managements were required to supply at their own expense uniforms and distinctive insignia to be worn by the guards for the purpose of identifying them as civilian auxiliaries (Appendix B, *infra,* pp. 148–149, *Atkins,* R. 110) and were also required to furnish the guards with appropriate weapons and to train the guards in their use (Appendix B, *infra,* p. 151, *Atkins,* R. 110–111).

With respect to "employee benefits" the regulations provide that "The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected. * * *"

(Appendix B, *infra*, p. 147, *Atkins*, R. 110). With respect to "labor relationships" the regulations provide as follows (Appendix B, *infra*, p. 148):

> Auxiliary Military Police are permitted to bargain collectively but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see *In re Lord Mfg. Co. & United Rubber Workers of America, CIO*, Case No. R–4826, February 1943), the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization.

Because the term "the same labor organization" involved an ambiguity, the War Department issued a clarifying memorandum on July 10, 1943, to the commanding generals of all service commands (*Jones*, R. 100–101). This memorandum states:

> 1. It has been reported to this headquarters that labor officers are interpreting Circular No. 15, this headquarters, 17 March 1943, subject, "Auxiliary Military Police," as prohibiting membership of plant guards enrolled as Auxiliary Military Police in the same trade-union local

as that representing production and maintenance workers.

2. Paragraph 6 (h) (2), Circular No. 15, presents applicable War Department policy on plant guard labor representation.

3. In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with the management, they should be represented by a bargaining unit other than that representing the production and maintenance workers. However, in such event, *both bargaining units may be affiliated with the same trade-union local,* provided they are, in fact, separate bargaining units. [Italics supplied.]

The regulations further provide that collective bargaining agreements covering plant guards who are civilian auxiliaries should include a clause recognizing that nothing in the collective bargaining relationship should interfere with the duties imposed upon the guards as Auxiliary Military Police (Appendix B, *infra,* pp. 147–148).

To enable the War Department to exercise adequate authority over the performance by plant guards of their obligations to the Government, plant guards were subjected to certain of the articles of war (Appendix B, *infra,* pp. 140–141, 158, *Atkins,* R. 105, 107–108). But because the guards were not "person[s] in military service" and therefore could not be punished by court martial in the same manner as soldiers by "forfeiture of

pay and allowances," appropriate modes of punishment for violation such as "a fine, as distinguished from forfeiture" were recommended in the regulations (Appendix B, *infra,* p. 155).

It was further provided in the regulations that "if a member of the auxiliary military police permanently quits his employment without approval by the plant guard officer" he might be discharged without honor (Appendix B, *infra,* pp. 143, 145–146, *Atkins,* R. 108). Discharge without honor was expressly stated to be an exceptional procedure "applicable to exceptional cases when the guard in fact is no longer in the employ of the company and is not available for dismissal, suspension, or reprimand" (Appendix B, *infra,* p. 145, *Atkins,* R. 108–109). The regulations further stated that "a member of the auxiliary military police employed by a civilian employer" who was thus discharged without honor from the auxiliary could appeal such action to higher military authority (Appendix B, *infra,* p. 146). In all other respects, guards who had been enrolled in the civilian auxiliary remained subject to the civil courts (Appendix B, *infra,* p. 155).

Recognizing that many privately employed plant guards were deputized by local authorities as sheriffs or marshals, the regulations pointed out that "in general there will be no considerable additional advantage" in maintaining such status, but that "there will be individual cases in which it will

be advisable to continue the local or state official capacity" (Appendix B, *infra*, p. 151, *Atkins*, R. 111). Finally, consistent with plant guard status as employees of private employers employed in a particular plant and related to the military forces for only a particular narrow purpose and in a limited capacity, the regulations provide that members of a guard force "may be assigned to duty in an emergency at places other than the premises of the plant normally served" only if "such assignment will contribute to the protection of the guard forces' own plant and its environs or to the protection of its production" (Appendix B, *infra*, p. 136).

Shortly after the militarization program was instituted, the National Labor Relations Board, in cases coming before it, recognized that militarized plant guards constituted a generic employee category, and that the incidents of their employment, and their relation to the military did not vary materially from plant to plant.[32] In cases referred to by the Board in its decisions

[32] A collection of more than 135 of the Board's decisions upholding the collective bargaining rights of plant guards as "employees" within the meaning of the Act, after their militarization, appears in Appendix C to the Board's prior petition for writs of certiorari in these cases, Nos. 1237 and 1238, October Term, 1944, pp. 38–41. See particularly *Matter of Chrysler Corporation*, 44 N. L. R. B. 881; *Matter of Budd Wheel Co.*, 52 N. L. R. B. 666; and *Matter of Dravo Corporation*, 52 N. L. R. B. 322. See also National Labor Relations Board, *Seventh Annual Report* (1943), p. 63; *Eighth Annual Report* (1944), p. 57.

in the *Atkins* case (*Atkins*, R. 7, n. 3, 4, R. 32, n. 1), the Board held that, under the War Department regulations, militarization did not affect the status of plant guards as employees of private employers under the National Labor Relations Act. In the *Dravo Corporation* case (52 N. L. R. B., at p. 327) the Board, in considering "the question whether the militarization of guards alters the character of their employment," declared that "it cannot seriously be contended at this time that guards who are sworn into temporary membership in the armed services lose thereby any of the benefits of the Act." Again, in the *Chrysler Corporation case* (44 N. L. R. B., at p. 885) the Board observed that "the Company contends that, even if their ordinary duties do not bar [the militarized guards] from rights guaranteed under the Act, this military regulation changes their employment status and that they are no longer 'employees' within the meaning of the Act." The Board rejected the employer's contention, finding that "the directive order [of the War Department] specifically preserves the essential employment relationship. The employer's right to discharge for cause remains. Hiring, compensation for services performed, and general working conditions remain matters to be adjusted between the employer and the employees through the usual employment contract."

In its decision in the *Atkins* case, the Board expressly noted that the agreement between plant guards and the Government, as well as the military regulations, rests upon and preserves the relation of employer-employee, between the guard and the private contractor (*Atkins,* R. 31). The Board further pointed out that while under the War Department regulations the contractor "may have surrendered to the military authority many of the attributes of control" normally exercised over plant guards, nevertheless, the private employer "retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act" (*Atkins,* R. 32).

In *Matter of Armour and Company,* 63 N. L. R. B. 1200, the Board further elaborated the reasoning upon which it rested its conclusion that militarized plant guards remained employees of their private employers. The Board said (63 N. L. R. B. at 1205):

> If the incidents of a particular service relation are such as to permit collective bargaining between those who receive services and those who render them, for changes in the terms and conditions of performing the service, the statutory objectives are capable of achievement and the relation may then be held to be one of employer and employee. *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111; *N. L. R. B.* v. *R. A.*

> *Blount*, 131 F. (2d) 585 (C. C. A. 8), certiorari denied, 318 U. S. 791. Thus, wherever the wages, or hours, or other conditions under which services are performed are fixed by the recipient of the service, either unilaterally or as a result of bargaining with the workers individually, the statutory objectives are capable of achievement, and unilateral or individual determination of such terms or conditions may appropriately be displaced by collective bargaining.

For this reason, the Board pointed out [63 N. L. R. B. at 1206] that, "the [employer's] claim that militarization has deprived it of full and complete control of all aspects of the employment relationship is, even if true, inadequate to establish its contention that it is no longer the employer of the guards within the meaning of the Act. The [employer] exercises control over many important aspects of the guards' employment and is, consequently, in a position to bargain collectively as to such matters."

The Board found nothing in the record in the *Atkins* case which would warrant distinguishing the militarized guards employed by that company from the militarized guards employed by other companies whose status as private employees for the purposes of the Act had been established in prior cases (*Atkins*, R. 31–32).

In setting aside the Board's determination, the court below substituted for the Board's findings

of fact respecting the employment relationship between respondent Atkins and its guards, findings of fact of its own (*Atkins*, R. 354–364). This, we submit, constituted a misapplication of the rule established by this Court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 127–129, 130–131, which entrusts to the Board and not to the courts the primary duty of determining the "underlying economic facts" of particular service relations, and of applying the definition of "employee" to such facts in the light of the statutory objectives.

The court found that the fact that the guards "were paid by respondent", admittedly, "the most important incident common to the employer-employee relationship", was "largely minimized if not entirely obliterated" by the fact that payment of the guards and "in fact their employment", was required by the Government "as a prerequisite to respondent's right to engage in the manufacture of war material" (*Atkins*, R. 354–355). In support of this conclusion, the court relied heavily on the fact that "this guard force was born of the exigencies of war" (*Atkins*, R. 355), and also recited that "no plant guard system had theretofore been in existence at respondent's plant" (*Atkins*, R. 362).

In asserting that respondent Atkins had employed no guard force prior to the time it began to manufacture war materials under government

contracts, the court below apparently overlooked the significance of the fact that when it was engaged in the manufacture of peacetime products, respondent Atkins employed 4 to 6 watchmen (*Atkins*, R. 88), a number which it obviously deemed adequate to provide all the protection that was necessary for its plant and products. To refuse to recognize that these watchmen constituted a peacetime "guard force" is to exalt nomenclature above substance. But, entirely apart from the fact that the record thus shows that the military authorities required respondent Atkins to expand its existing protective force, not to create one *ab initio*, the court below misconceived entirely the effect of this requirement with which respondent Atkins undertook to comply, upon the relation between the company and the guards it hired.

Respondent Atkins, of course, was not required to enter into contracts with the Government in the first place. To obtain such Government contracts respondent Atkins undertook to comply with whatever requirements the Government saw fit to impose respecting the terms and conditions under which the contracts were to be performed. For example, to meet the specifications of the contract, respondent Atkins may have been required to obtain new and different types of machinery, or to employ persons with skills entirely different from those it had previously employed. One of the requirements to which respondent

Atkins automatically became subject upon undertaking its contracts with the government, was that it comply with the provisions of the Walsh-Healey Act, Sec. 1, 49 Stat. 2046, 41 U. S. C. 35, respecting the payment of minimum wages and maintenance of other specified conditions of employment for employees engaged in work on such contracts. The requirement that contractors comply with the directives of military authorities in providing adequate plant security was merely another condition which the Government attached to the issuance of such contracts. The fact that military authorities required respondent to hire additional personnel constitutes no basis for differentiation. The maximum-hour provisions of the Walsh-Healey Act, or the specifications of a particular contract, may well require a contractor to employ more help, or a different type of help, on a particular project than the contractor would voluntarily employ. If the reasoning of the court below were sound, it would follow that all such extra employees whom the contractor hired to comply with the Walsh-Healey Act, or with the specifications of a Government contract, were not employees of the contractor at all. We believe that no one would contend for so extreme a result.

In support of its conclusion that the fact of payment of the guards by respondent Atkins was without significance, the court below indulged the assumption that "respondent was reimbursed by

the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards," and that respondent Atkins therefore served as a mere conduit for payment of the guards by the Government (*Atkins*, R. 355). The record plainly shows, however, that respondent Atkins was not a cost-plus-a-fixed-fee contractor whose labor costs were borne directly by the government (*Atkins*, R. 332–333, 326–327). It is therefore clear that the court below erred in assuming that the rate of wages respondent Atkins paid the guards had no direct relation to the amount of profit which the company derived from its contracts.

But, most significantly, nowhere in its opinion did the court even advert to the undisputed fact that respondent Atkins determined unilaterally, and without any reference to the military authorities, or the government, how much the guards were to be paid (*Atkins*, R. 54, 93). As we shall point out below (*infra*, pp. 89–93), this fact, standing alone, affords sufficient support for the Board's conclusion that the guards remained "employees" of respondent Atkins within the meaning and for the purposes of the Act.

The court below substituted for the Board's findings that "the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; * * * their discharge is ordi-

narily initiated by respondent" (*Atkins*, R. 31; 53–54, 59, 68–72, 81–84, 91–92), the court's own inference that "the authority to hire and discharge was solely the prerogative of the military" (*Atkins*, R. 357). The substitution stems, we submit, from a misreading of the applicable military regulations and of the record.

Thus, as to hiring, the regulations show that guards were normally enrolled as civilian auxiliaries to the military police only after they were employed by the private contractors (Appendix B, *infra*, pp. 136–137, 140, 144–145. And the record in the *Atkins* case itself shows that the only rank and file guard who testified, and the chief guard himself, were hired by, and remained in the employ of the company, from one to three weeks prior to their enrollment in the auxiliary military police (*Atkins*, R. 31; 53–54, 59, 68–72, 82–83). The only control reserved by the military over the hiring of citizens as plant guards was the right to veto the employment of such a guard if it was believed that his employment would impair the efficiency of the guard force (Appendix B, *infra*, p. 145, *Atkins*, R. 109) and to require dismissal of a guard if he refused to become a member of the auxiliary military police (Appendix B, *infra*, p. 143, *Atkins*, R. 108). Since the plant operator selected the guards in the first place, it had absolute power to prevent the employment of any guard, a power much greater

than the veto power reserved by the War Department. Only where it was proposed to employ aliens as guards did the military exercise more than a veto power; in such cases, approval by the Secretary of War was required before aliens could be employed (Appendix B, *infra,* p. 137, *Atkins,* R. 107).

The regulations expressly reserve to plant managements the right to dismiss plant guards, subject to the same limited veto power available to the military in the case of hiring (Appendix B, *infra,* p. 145, *Atkins,* R. 109). In addition, the plant operator could suspend guards from duty without the need of securing War Department approval (*supra,* pp. 25–26). There is not a scintilla of evidence in the record that this right was, contrary to the regulations, denied to respondent Atkins by the military authorities.

The court below, therefore, not only exceeded the bounds of its reviewing authority in substituting for the Board's reasonable inferences as to the employer's powers respecting hiring and discharge, its own inference that the employer's sole power in such matters was that "of making recommendations to the military authorities" (*Atkins,* R. 358) (*National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105); it erred additionally in drawing inferences for which the record affords no support.

Finally, the court below substituted for the

Board's finding that respondent retained a "sufficient residual measure of control over the terms and conditions of employment of the guards" to satisfy the requirements of the Act (*Atkins*, R. 32), its own inference that "all control was exercised by the Army" (*Atkins*, R. 358) and that respondent Atkins "exercised no control" (R. 360). As appears from the facts set forth in the Statement (*supra*, pp. 27–30), there is no evidence that the plant guards here involved received any orders directly or indirectly from the Military Authorities, except the general guard orders applicable to all guard forces at all plants. The specific orders to the guards by way of assignment of work and the details thereof all came, so far as the record shows, from the chief guard who was a civilian (*Atkins*, R. 62, 78, 81). The only subjects about which the chief guard claimed to have consulted the military were the hiring and discharging of guards (*Atkins*, R. 83–84).

The point which the court below seemingly overlooked was that the chief guard in whom respondent Atkins apparently vested plenary power to control the normal, day-to-day activities of the guard force, was himself a civilian employed by respondent Atkins for the purpose of supervising the guards; respondent Atkins did not, nor, under the regulations, could it, transfer the power and responsibility to exercise such control to the Army. Respondent Atkins obviously cannot deny that it

exercised control over the terms and conditions of employment of the guards on the ground that only its chief guard, not its higher officials, exercised such control. And the record leaves no doubt that the chief guard did, in fact, without notifying or consulting the military authorities, exercise such day-to-day control. Thus, for example, on his own initiative, the chief guard established a system of rotating shifts for the guard force (*Atkins*, R. 78–79). There is not even a suggestion in the record that this action was taken at the request of, or even with the approval of, military authorities, or that in so determining the working hours of the guard force, the chief guard was exercising any power other than that which respondent Atkins had vested in him as supervisor of its guard force. Another illustration of the plenary authority which respondent Atkins vested in the chief guard is the manner in which promotions within the guard force were made. Chief Johnston testified that he had "final authority" to promote rank and file guards to the position of lieutenant, and that in exercising that authority he decided, without consulting anyone, which guard was to be promoted (*Atkins*, R. 82). Johnston further testified that after making this decision he "made [the guard] a lieutenant, myself, in my office, gave him his gold badge and his authority and posted the notice that he was a lieutenant, and then I went to Personnel and advised them that he was the new lieutentant," and that thereafter the newly created

lieutenant "got his increase in pay" (*Atkins*, R. 82).

The foregoing evidence, we submit, establishes beyond doubt, that respondent, through its chief guard, exercised, as the Board found, a substantial measure of control "over the terms and conditions of employment of the guards." But even if it were true, as the court below erroneously assumed (*Atkins*, R. 349–350, 358–360, compare *infra*, pp. 88–90), that the "control" test under the Act turned upon direction of "physical conduct in the performance of the service" (cf. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 128), the evidence that respondent Atkins unilaterally determined the hours of the guards' employment would suffice to establish that respondent Atkins, not the Government, was the employer of the guards.

On the facts as it found them, the court below concluded that respondent Atkins was not the employer of the guards (*Atkins*, R. 364).[33] But the court did not hold that the guards were employees of the United States of America (*ibid.*), and were for that reason exempted from the cov-

[33] In this connection, the court stated that in the oath of allegiance taken by each plant guard "no mention is made of any allegiance owed to" the employer (*Atkins*, R. 354). But this very oath recites that the guard is "employed" by the plant operator (Appendix B, *infra*, p. 160). That, of course, is a sufficient acknowledgment of the duties to his employer which the guard undertook from the moment he was employed.

erage of the Act by the terms of Section 2 (2).[34] Such a holding was precluded by the statutes of the United States which prohibit the United States from employing these guards under the circumstances existing in this case,[35] as well as by the terms of the War Department regulations which clearly disclose the intention of the War Department that the civilian plant guards, although militarized, shall remain employees of the contractor (*supra,* pp. 64–73). Such civilian guards, under the regulations, expressly remain covered by the Social Security Act (*supra,* p. 69), from which, if they were employees of the United States, they would be exempt. See 42 U. S. C., Sections 409 (b) (6) and 1011 (b) (6). Moreover, the regulations themselves distinguish between the effect of militarization upon those

[34] Section 2 (2) of the Act provides that "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States * * *." Since only employers can engage in unfair labor practices (Section 8), Section 2 (2) of the Act has the effect of excluding employees of the United States from coverage by the Act.

[35] Thus Section 665 of 31 U. S. C. provides in part as follows: "Nor shall any department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in sudden emergency involving the loss of human life or the destruction of property." Section 66 of 5 U. S. C. provides in part that: "No Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States * * *."

guards who are "in the employ of a private employer" and those who are "Civil Service employees in the employ of the War Department" (Appendix B, *infra*, p. 145). It has never been suggested that respondent Atkins' guards were in the latter category. Under these circumstances, it is clear that the control exercised by the War Department over the respondent Atkins' relations with its guards could not possibly transform the guards from private employees into employees of the United States.

Nor did the court below hold that the guards were members of the armed services. Such a holding was precluded by the fact that the plant guards were never inducted into the armed forces in accordance with the statutory formulae and never took the oath of enlistment required of soldiers. See, 10 U. S. C. 634; 1581. Moreover, the guards were rendered subject to the Articles of War under Section 2 (d) thereof (10 U. S. C. 1473; *Atkins*, R. 118), which, by definition, applies only to persons who are *not* members of the armed forces. Moreover, the War Department regulations clearly recognize that the militarized plant guard is *not* "a person in military service" (*supra*, p. 71). Compare the statement of the Attorney General, Appendix D, *infra*, pp. 164–165.

The court below found it unnecessary "to determine the technical status which [the civilian plant guards] occupy with the federal govern-

ment" (*Atkins*, R. 364). It concluded that the guards forfeited their status as employees under Section 2 (3) of the National Labor Relation Act because their relationship to the Federal Government was "closely akin to that of a soldier" (*ibid*). In reaching this conclusion the court below failed to apply the applicable standards governing interpretation of the term "employee" which have been established by this Court, and applied instead a standard which this Court has expressly repudiated.

In *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 120–129, this Court made it clear that neither particular nor generalized concepts of the incidents required to establish the existence of an employment relation at common law are controlling upon the question whether an employer-employee relation exists for the purposes of the National Labor Relations Act. The Court pointed out (322 U. S. at 128), that the controversies between employer and employee with which the Act was concerned could not "be limited to disputes over proper 'physical conduct in the performance of the service,'" and that therefore "Where all the conditions of the relation require protection, protection ought to be given" (322 U. S. at 129).

These guiding principles the court below in the *Atkins* case completely ignored. Concentrating exclusively, as respondent Atkins had urged

(*Atkins*, R. 13–14), upon the primary common-law indicia of employment, namely, the locus of the right to hire and discharge and to control the physical conduct of the guards in the performance of their service, the court below concluded that, since *in its view these common-law* employer prerogatives had passed to the military authorities, respondent Atkins could not be held to be the "employer" of the guards. Ignoring completely the admitted facts upon which the Board relied, that respondent Atkins fixed the wages of the guards, determined their hours of work and decided which guards to promote to higher positions on the guard force (*supra*, pp. 26–27), the court concluded that "any field open for bargaining between the Union and respondent is an extremely limited one" (*Atkins*, R. 365), and that enforcement of the Board's order would therefore "be little more than an idle gesture," of no "practical benefit" (*Atkins*, R. 366). This constituted an utterly unwarranted substitution of the court's judgment on whether the policies of the Act could be effectuated by holding the guards to be "employees" for the judgment of the Board which was based upon reasoning thoroughly articulated in its decisions (*supra*, pp. 73–76). The *Hearst* case, 322 U. S. at 130–132.

As long as respondent Atkins was free, to take only one example, to determine for itself the amount of wages to be paid the guards, without

any review by the Government, it was free to bargain about that subject with the guards individually. If respondent Atkins was free to bargain with the guards individually it was equally free to bargain with them collectively. And the inequality of bargaining power between the guards and the respondent in that situation compels the view that, under the premises of the Act, if the guards choose to bargain collectively, respondent, under the law, must honor their choice. The field open for collective bargaining, as we have indicated above, extends to more matters than the determination of wages, although if that issue alone were open it would suffice to warrant extension of the benefits of the Act to the guards, for, as the court below itself conceded, pay "is the most important incident common to the employer-employee relationship" (*Atkins,* R. 354). When to that issue can be added, as here, determination of hours of employment and rules governing promotion, it appears beyond doubt that collective bargaining is "appropriate and adequate" for the "friendly adjustment" of such disputes as may arise between respondent Atkins and its guards over the very matters with which the Act is concerned.

The most that can be said in behalf of respondent Atkins' position is that the range of discretion open to it in controlling the work performance of the guards is subject to greater restraint

than is true with respect to its other employees. Even as to such other employees, however, respondent's discretion is not unlimited, but subject to numerous restraints imposed by labor laws, safety regulations, minimum wage laws, workmen's compensation acts, the Selective Service Act, and numerous others, including the National Labor Relations Act. The fact that the Army might in an emergency assume complete control over the activities of the guard force is a contingency hardly different in kind from that provided for in the Selective Service Act, pursuant to which an employer might find a large portion of his working force inducted into the armed forces.

The Board is not alone in its conclusion that plant guards, when militarized, remain employees of the plant operator. Such guards have been treated as private employees for purposes of the Fair Labor Standards Act (*Walling* v. *Lum*, 7 Wage Hour Rep. 570 (S. D. Miss.), and by the National War Labor Board (*In re Detroit Steel Products Co.*, 6 War Lab. Rep. 495; *In re Brewster Aeronautical Corp.*, 11 War Lab. Rep. 286, 15 War Lab. Rep. 239, 240–243; *In re Great American Industries*, 11 War Lab. Rep. 287; *In re Youngstown Sheet & Tube Co.*, 15 War Lab. Rep. 590, 19 War Lab. Rep. 813; *In re General Motors Corp.*, 18 War Lab. Rep. 541). We are informed that they are also so treated by the Social Security Board.

The courts have held that persons occupying positions analogous to that of militarized plant guards in respect of their obligations to the Government were employees of private employers within the meaning of the Act, and for other purposes as well. Thus in *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457, the Circuit Court of Appeals for the First Circuit considered the status under the Act of drivers employed by an independent contractor who was engaged in hauling mail for the United States. Under his contract with the United States the contractor was required to furnish bond for faithful performance of the requisite services. His power to hire was limited to persons meeting certain specified age and educational standards. Drivers employed by the contractor were required to take an oath prescribed by the Post Office Department and to wear a standardized cap or hat, with badge. Drivers were required to load and unload the mails "under the direction of authorized representatives of the Post Office Department"; their vehicles and services were at all times "under the control of the postmaster", and were to be operated "under such schedules as the postmaster may prescribe." In addition, the postmaster reserved the right to "require the contractor to suspend a driver from duty for inefficiency or other serious delinquency". The court held,

nevertheless, that the contractor had "sole authority to fix * * * hours of work, rates of pay, and other conditions of employment" and was, therefore, the employer of the drivers within the meaning of the Act.* So too, the Circuit Court of Appeals for the Sixth Circuit, in the *Jones & Laughlin* case, upheld the Board's conclusion that militarized plant guards are employees of the plant operator (*Jones*, R. 84).

Under these circumstances we believe it cannot be gainsaid that the Board's conclusion that the militarized guards remained employees of respondent Atkins has "warrant in the record" and "a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131.

2. *Militarization did not require the Board to deny bargaining rights to plant guards or to limit*

* See also *Hust* v. *Moore-McCormack Lines*, No. 625, October Term, 1945; *New Orleans Belize S. S. Co.* v. *United States*, 239 U. S. 202, 206; *Glen Alden Coal Co.* v. *National Labor Relations Board*, 141 F. 2d 47, 50–52 (C. C. A. 3); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 199–201 (C. C. A. 6), certiorari denied, No. 1198, October Term, 1945; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Carroll* v. *Social Security Board*, 128 F. 2d 876, 879 (C. C. A. 7); *Fleming* v. *Gregory*, 36 F. Supp. 776 (E. D. La.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742, 747 (W. D. Va.); *Thompson* v. *Daugherty*, 40 F. Supp. 279, 282 (D. Md.); *Restatement of the Law of Agency*, Ch. 7, Sec. 227 (b). Cf. *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358, 362.

their freedom of choice of representatives to organizations not representing production and maintenance employees.—During the period between July 2, 1942, when the militarization program went into effect, and March 17, 1943, when the War Department promulgated the regulations respecting collective bargaining (see *supra* p. 65), the Board gave serious consideration, in the cases which came before it, to the question whether militarization constituted an obstacle to collective bargaining by plant guards; whether, in the public interest, limitations should be imposed upon the right of militarized plant guards to bargain collectively through unions representi[illegible] production workers; and whether militarized guards should ever be consolidated in a single unit with production and maintenance workers. The Board concluded that the public interest required, rather than precluded, extension to militarized plant guards of the full benefits of the Act and that representation of plant guards by unions representing production and maintenance workers was in no sense incompatible with the guards' duties to the government. The Board, however, also concluded that because of their special obligations to the government, militarized guards should not be included in units of production and maintenance workers, even though, in certain situations, the inclusion of plant guards in such bargaining

units would, absent militarization, be warranted under its normal determinants for the shaping of units of guards and production workers, such as the functional coherence between the two kinds of work, the history of bargaining, whether on a differentiated or joint basis, and the desires of the organizations involved.[37]

Thus, in *Matter of Chrysler Corp.*, 44 N. L. R. B. 881, 884–885, decided October 7, 1942, the Board placed plant guards in a separate bargaining unit and noted that "The present production of war materials at the Company's plants increases the importance of their work and their responsibilities." The Board then rejected the argument that plant guards should be denied the right to bargain through a union representing production workers in the following language (p. 886):

> Freedom to choose a bargaining agent includes the right to select a representative which has been chosen to represent other employees of the employer in a different bargaining unit. We are mindful of the increased responsibilities placed upon plant-protection employees in wartime, but the practices and procedures of collective bargaining are flexible, and may make full

[37] See Third Annual Report of the National Labor Relations Board (Government Printing Office, 1939), pp. 184–190.

allowance for such added responsibilities.* If, in the instant case, the plant-protection employees select a local affiliated with the International to represent them as bargaining agent, it will be incumbent upon the International to impose a proportionate responsibility upon both organized groups of employees in order that their respective duties may be adequately and impartially performed.

*See also *Matter of Frigidaire Division, General Motors Corporation*, and *United Electrical, Radio & Machine Workers of America, (C. I. O.)*, 39 N. L. R. B. 1108, and cases cited therein [Board footnote].

The *Chrysler* decision was followed in several subsequent cases, including *Matter of Lord Manufacturing Co.*, 47 N. L. R. B. 1032, decided February 25, 1943.

The care with which the Board has treated this problem and its consciousness of the considerations involved are also manifest from its decision in *Matter of Dravo Corp.*, 52 N. L. R. B. 322, 327–328. In the *Dravo* case the Board not only segregated the guards from production workers for bargaining purposes but separated a unit of guards who were militarized from those who were nonmilitarized. It thus indicated the reasons for its decision:

> The militarization of plant-protection employees, while no obstacle to unionization, is nevertheless significant. As civilian

> auxiliaries of a military force, the guards have greater duties and obligations than have those plant-protection employees who are not militarized. To the end that the guards may be better able to function within the military sphere, and to permit the military authorities to exercise greater control over the guards, we shall establish a bargaining unit for all militarized plant-protection employees separate and apart from those who are non-militarized. We contemplate that the separation of the bargaining units in their negotiations with the Company and their day-to-day activities will be one of fact, not merely form.

In the *Armour* case, the Board again rejected an employer's contention that membership by militarized plant guards in a production workers union was incompatible with the duties owed by the guards to the Government. The Board stated that, nothing in the obligations assumed by a guard upon joining a union "would justify a belief that any duality of allegiance is created to the detriment of the duties performed by the guards. Moreover, it is obvious that if any conflict arose between the loyalty owed by the guards to the Government of the United States and their loyalty to the Union, loyalty to the Government would be their paramount obligation. * * * We have refused in the past to hold that membership in a union tends to undermine the honesty of plant-protection employees or their competence to ex-

ecute their duties satisfactorily (*Matter of Draco Corporation,* 52 N. L. R. 322, 327); we now decline to hold that membership in a union tends to undermine their patriotism" (63 N. L. R. B. 1207).

This administrative policy, and the reasons which underlie it, initiated by the Board in order to accommodate collective bargaining to the exigencies of war production, the military authorities approved and adopted. The War Department regulations, under the heading of "Labor Relations," Section 6 *h*(2) (Appendix B, *infra,* p. 148), make it clear that "Auxiliary Military Police are permitted to bargain collectively." They further make it clear that Auxiliary Military Police are permitted to join and to select as their collective bargaining representative the *same trade union* local, which represents the production and maintenance workers in the plant (Jones, R. 100–101). Basing its ruling upon the Board's decision in the *Lord Manufacturing* case (p. 96, *supra*), the War Department expressly provided that militarized plant guards, whether or not they select as their representative the same labor organization which represents the production workers, should be grouped for purposes of collective bargaining in a separate unit, apart from bargaining units composed of other types of employees (Appendix B, *infra,* p. 148). These provisions are clearly founded upon the War Department's concurrence with the Board's view that there is no necessary

inconsistency between the obligations assumed by guards upon joining any union and the guards' obligations to the government.

In its initial opinion in the *Atkins* case, the court below, ignoring the fact that the War Department regulations had been predicated upon reasoning theretofore enunciated by the Board, and that they expressly embodied the rules theretofore applied by the Board, concluded that the regulations constituted an impediment to all self-organization and collective bargaining by militarized guards, and compelled a "postponement of the right to bargain, as contemplated by the Act, until some future time" (*Atkins*, R. 364). Thus the court below asserted that the condition imposed by the regulations, that no concerted activity by the guards would be tolerated which would interfere with their duties to the Army, rendered the War Department's express affirmation of the right to bargain collectively a mere "gratuity", "on a par with that extended to a boy when he is given permission to swim, providing he stays away from the water" (*ibid.*).

Apart from the fact that in reaching this conclusion the court below obviously misconstrued the intent and purpose of the War Department regulations, its assumption that collective bargaining by militarized guards would necessarily interfere with faithful performance of their duties to the military authorities is patently un-

warranted and unsound. Wages can be established, working hours set, seniority rules adopted, and grievance procedures inaugurated, through collective bargaining between the representative selected by the guards and the plant operator, without touching upon, much less interfering with, any obligation the guards owe to the Government.

In its initial opinion in the *Jones & Laughlin* case, the Circuit Court of Appeals for the Sixth Circuit, without indicating what weight, if any, it attached to the applicable provisions of the War Department regulations, determined that militarized plant guards could not, consistent with their duties to the Army, assume obligations to unions composed of production workers, and held that the Board could not lawfully require employers to bargain collectively with a representative freely chosen by such guards, if, as in the *Jones & Laughlin* case, the representative selected by the guards also represented a separate unit composed of production workers. The court below stated its views in the following language (*Jones*, R. 88–89):

> When these particular Unions were selected as bargaining agents for the plant protection employees, these employees might in an effort to discharge their duty to their employer find themselves in conflict with other members of their Union over the enforcement of some rule or regulation they were

> hired to enforce; or upon the other hand, in conflict with the Federal Government because of fealty to the Union at the time of a dispute involving the public interest. We think that the imposition of such strains upon personal allegiance and personal interest would undobutedly be detrimental to the public interest and to the free flow of commerce.

In its original opinion in the *Atkins* case, the Circuit Court of Appeals for the Seventh Circuit went even further. It held that (*Atkins*, R. 366):

> * * * Nothing should be permitted which will interfere in any degree or to any extent with the obligation which these guards have with the military. Membership in a union with the right to bargain might, in fact is likely to, do that very thing. To so state is not to cast any reflection upon the patriotism of the guard members. It is merely a recognition of that which is a matter of common knowledge.

In thus deciding that union membership and collective bargaining by plant guards were incompatible with national security in time of war the courts below substituted their judgment of the effect collective bargaining was likely to have upon the guards' adherence to their obligations to the Government for the considered judgment of the Board and of the War Department. In formulating these judgments the courts below, as their opinions show, relied neither upon past ex-

perience nor upon evidence in the records before them. On the basis of sheer speculation in one case (*Jones*, R. 88–89), and what was termed "common knowledge" in the other (*Atkins*, R. 366), the courts below upset a bargaining pattern which the military authorities, who are charged with ultimate responsibility for the proper functioning of the militarized guards as a wartime protective force, expressly approved, and which the Board, which is charged by Congress with administering the collective bargaining statute in the public interest, had formulated and applied in over a hundred cases (*Jones*, R. 95, 107–111).

In its opinion in the *Jones & Laughlin* case, the Sixth Circuit attempted to justify its disregard of the rule which requires the courts to uphold Board determinations as to how the policies of the Act may best be reconciled with other important public and private interests unless the Board's determinations are arbitrary or capricious (See, e. g., *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 797–798; *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. C. A. 3) (*infra*, n. 38, p. 104); *National Labor Relations Board* v. *Air Associates*, 121 F. 2d 586, 592 (C. C. A. 2); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 816 (C. C. A. 7)), on the ground that the Board in this case, allegedly, had given no consideration to needs of wartime plant

protection and to the interests of the Government. This assumption by the court below simply does not conform to the facts.

As we have demonstrated above, the Board's policy in this field was formulated only after the most careful consideration of the special responsibilities of the guards in wartime and the effect which either denial or protection of their bargaining rights would have upon our wartime economy. The public interest with which the Board was here concerned, that production should not be impeded and commerce burdened by strikes for recognition is even more important in time of war than in time of peace. By insisting that the Board refuse to accord statutory protection to the right of plant guards to bargain through freely chosen representatives, the courts below ignored the effects upon production which Congress, on the basis of its experience, was convinced would follow from such a withholding of remedy (Act, Section 1).

The courts below were of the opinion that the wartime emergency required limitations on the process of collective bargaining. The policy of the government during the wartime period rested on the opposite view. In adopting the War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. (Supp. V) 1501, *et seq.*, Congress was careful to provide that all actions of the National War Labor Board under the statute must "conform to the provisions of * * * the National Labor Relations Act." Section 7 (a) (2). The same limitation

was placed upon government agencies which operated facilities under the Act. Section 5. Congress thus recognized that, as the Board has held, "An efficient prosecution of the war effort demands the preservation of the right to collective bargaining, not its destruction." *Budd Wheel* case, *supra*, 52 N. L. R. B., at p. 670.[38]

This is particularly true in the case of militarized plant guards. For during the wartime emergency these employees surrendered their right to strike and to engage in other concerted activities whereby they might protect their interest in securing decent wages, hours and working conditions, and submitted to novel restraints in the interests of the war effort. Under these circumstances, to deny the guards the right to

[38] Cf. *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. C. A. 3) in which the court stated:

"The second consideration, namely, the serious nature of the production of everything that pertains to war industry is of obvious importance. But the argument of lawyers in a courtroom that the disestablishment of a present bargaining unit and the abrogation of a present contract will disturb that production or will not disturb it is necessarily pure speculation. The Board is charged with the responsibility of representing the public interest, not that of private litigants. This the courts have said over and over again. Neither we nor counsel may assume that the Board is not conscious of all the factors to be taken into consideration in the present emergency nor have we any reason to assume lack of competence on their part to arrange such adjustment as is necessary to preserve the public interest. The problem is peculiarly one for expert administration and that the statute has lodged in the Board, not the courts."

bargain collectively through freely chosen representatives would be to leave them completely at the mercy of their private employers, who, operating for profit, would have unfettered power to impose upon the guards any wages, hours or working conditions they might deem proper. So obviously unfair a result can be avoided only by preserving intact the right of the guards to bargain collectively through any representative they may freely select, including organizations composed of production and maintenance employees. Often indeed, such an organization, which already represents the main body of workers in a plant, is the only one willing to undertake the obligation of representing the plant guards in collective bargaining. Certainly, such an organization is often the best qualified to undertake such representation, both because of prior experience in negotiating with the management and because of its intimate knowledge of wage structures and working conditions in the plant generally. Moreover, simply because of the limitations necessarily imposed upon the right of the guards themselves to exercise economic pressure upon the employer in support of their demands, it is essential that they be permitted to select as their bargaining agent an organization which, because it represents the production workers, has sufficient bargaining power effectively to represent them. To preclude the plant guards from selecting such an

organization to represent them, therefore, relegates the guards to a position of hopeless inequality in dealing with management concerning their own wages, hours and working conditions. Further, by compelling the introduction of a new labor organization into the plant it invites friction between competing unions which could not fail to have ill effects upon industrial peace.

Nowhere in the opinions of the courts below is there any indication that these crucial factors were even considered. Instead the courts below concentrated exclusively upon the alleged danger that militarized plant guards, if union members, might fail to enforce some rule or regulation against fellow members of the union, or might fail to perform their duties to the government in time of a strike (*Jones*, R. 88–89; *Atkins*, R. 366). Neither the Board nor the War Department were oblivious of these dangers. Both concluded, however, as we have shown (*supra*, pp. 93–98), that they could be sufficiently minimized, and indeed entirely avoided, by appropriate measures which did not involve sacrifice of the right of the guards to bargain collectively through freely chosen representatives.

The judgment of the Board and the War Department has been confirmed by experience. The Board has certified bargaining representatives for units of militarized guards in more than 105 cases. In more than 80 of these cases, the

certified union also represented a separate bargaining unit of other employees of the same employer. In a large number of these cases, the employer recognized the certified union and entered into contractual relations with it. See cases listed in Appendix C, pp. 38–41, of the petition for certiorari in Nos. 1237 and 1238, October Term, 1944. Despite the extensive application of this policy, the Board has received no indication from any source that the dangers to the public interest and particularly to the war effort which the courts below thought to inhere in that policy have in fact materialized in any case.

The opinions of the courts below fail to conform to statutory standards in yet another important respect. Thus, in the *Jones & Laughlin* case, the Circuit Court of Appeals for the Sixth Circuit held that under Section 9 (b) of the Act, the Board was required to withhold collective bargaining rights from the plant guards because they had selected as their bargaining agent a labor organization which also represented a separate unit of production workers. This holding was predicated upon the court's expressed conclusion that the statute empowered the Board, acting with a view to the public interest, "to select bargaining agents" for appropriate units of employees (*Jones*, R. 88). The Circuit Court of Appeals for the Seventh Circuit, in its original opinion in the

Atkins case, announced its agreement with this view (*Atkins*, R. 365–366).

The Board is of the opinion that it does not have the power under the Act to substitute for the desires of employees its own views as to who shall represent them for purposes of collective bargaining. As early as June 15, 1942, in *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973, 976–977, the Board stated:

> * * * if the guards are employees within the meaning of the Act, then obviously it is not * * * for the Board to say that they may not join unions of production workers or designate such unions to represent them for purposes of collective bargaining. The Act guarantees all employees freedom of self-organization, and the designation of bargaining representatives is left to "their own choosing." Production employees may well exercise their right of self-organization by excluding guards from their bargaining unit; and in appropriate circumstances the Board has deemed the differences in function and interest of the two groups sufficient to exclude guards from a unit of production employees. But neither the production employees, nor the employer, nor the Board can deny the right of the guards as employees to bargain in a unit appropriate for them and to designate any representative they choose for the purpose.

This view, which the Board has recently reaffirmed as it affects supervisory employees, see *Matter of Jones & Laughlin Steel Corporation, Vesta Shannopin Coal Division,* 66 N. L. R. B. 386, comports exactly with the language of the statute, with the opinion of this Court in *Hill* v. *Florida,* 325 U. S. 538, 541, and with the opinion of the late Mr. Chief Justice Stone dissenting on other grounds in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, 171-172. Compare Brief for the National Labor Relations Board in *Packard Motor Car Co.* v. *National Labor Relations Board,* No. 658, this Term, pp. 100–102. In the light of the key importance which the statute attaches to the value of full freedom of choice of representatives by employees, we respectfully submit that the courts below erred in attributing to the Board under the Act a power to limit and veto the employees' choice.

C. *Deputization does not alter the status of plant guards as private employees or deprive plant guards of the right to bargain collectively through labor organizations which also represent the employer's production and maintenance employees.*—In many of the cases involving the collective bargaining rights of plant guards which the Board decided both before and during the war period, the guards involved had been deputized by local or state officials as deputy sheriffs

or special police.[39] The Board has uniformly held in such cases, as, for example in *Matter of Bethlehem-Fairfield Shipyard, Inc.*, 61 N. L. R. B. 901, 906, that the limited police powers of the guards serve only to implement their authority, and do not alter their status as employees of the company involved. As the Circuit Court of Appeals for the Eighth Circuit observed in *Chicago and N. W. Ry. et al* v. *McKenna*, 74 F. 2d 155, 157:

> It is a common practice * * * to appoint private watchmen who are employed exclusively by agencies or individuals to protect property and who are commissioned by local police authorities so that they may have proper authority to effectively function.

That court, like the Board, was unable "to see that this grant of authority to the watchman transforms in any way his relation to the company as an employee." The court concluded:

[39] See e. g. *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181; *Matter of Bendix Products Corp.*, 3 N. L. R. B. 682; *Matter of Willys Overland Motors Inc.*, 9 N. L. R. B. 924; *Matter of American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355; *Matter of Westinghouse Electric & Mfg. Co.*, 28 N. L. R. B. 799; *Matter of General Motors Corp.*, 39 N. L. R. B. 1108; *Matter of American Brass Co.*, 41 N. L. R. B. 783; *Matter of Westinghouse Airbrake Co.*, 42 N. L. R. B. 525; *Matter of Standard Steel Spring Co.*, 62 N. L. R. B. 660, 662–663; *Matter of Frick Company*, 63 N. L. R. B. 836–841; *Matter of Bethlehem-Fairfield Shipyard, Inc.*, 61 N. L. R. B. 901, 905–906.

> It is true that they are a particular kind of police officer, but it would be strange to be told that such watchmen in the performance of the only duties they are privately employed to perform are purely public officers with no responsibilities for their acts upon their employers.

Those cases cited in the opinion of the court below in the *Jones & Laughlin* case (*Jones*, R. 121–122), which hold that deputized guards are public officers, deal only with the relationship between the guards and persons other than their employer. They do not impugn in any way the theory of the *McKenna* case, *supra*, that deputization does not change the employee's "relation to the company as an employee." Thus, the holding of the New York Court of Appeals in *Dempsey* v. *New York Central and Hudson River R. R. Co.*, 146 N. Y. 290, is that a statutory "railroad policeman" employed by a railroad is entitled to a free pass as part of his compensation as an employee despite a state constitutional provision forbidding the issuance of a "free pass" to any "public officer."

To allow the "common practice" of deputizing watchman to be used as an excuse for evading liability for the acts of the protective force which is necessary to the operation of any plant would, in the words of another court, "destroy, as it ought, respect for government and courts." *Kusnir* v. *Pressed Steel Car Co.*, 201 Fed. 146, 151 (S. D., N. Y.). See cases collected, 55 A. L. R.

1197. Just as an employer may not evade responsibility for the tortious acts of his plant guards merely by inducing public authorities to deputize them so that they may function more effectively to protect his property, so may he not, by this device, destroy his statutory obligation to pay the wages prescribed by the Fair Labor Standards Act.[40] Nor may an employer by this device avoid his duty to bargain collectively with the guards' duly designated representative.

In its opinion following the remand, the court below in the *Jones & Laughlin* case, while conceding that the deputized plant guards there involved remained "employees" under the Act, and were consequently "entitled to bargain collectively" (*Jones,* R. 121), concluded that because of the duties which deputized guards owe to the public, they could not lawfully be permitted to select as their representative a labor organization which represented the employer's production and maintenance employees. Thus the court said (*Jones,* R. 122):

> In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards to the municipality and state would be incompatible with their obligations to the Union which, since it represents production employees,

[40] *Walling* v. *New Orleans Private Patrol Service, Inc.*, 57 F. Supp. 143 (E. D. La.); *Walling* v. *Merchants' Police Service, Inc.*, 59 F. Supp. 873 (W. D. Ky.); *Holmes* v. *Industrial Cotton Mills Co., Inc.*, 8 Wage Hour Rep. 1174 (D. S. C.).

> authorizes and directs the strike. As pointed out in our previous opinion, it is the duty of the Board to consider the public interest as a material factor in selecting appropriate units for collective bargaining. *Marshall Field & Co.* v. *National Labor Relations Board,* 135 Fed. (2d) 391, 393 (C. C. A. 7); *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.,* 128 Fed. (2d) 130, 137 (C. C. A. 3). We adhere to our conclusion that in the order under consideration the Board failed to give adequate consideration to the public welfare. A contrary conclusion would open wide the door to disorderly and criminal acts because of the limitation which the Board's order places on the power of the Government to furnish adequate police protection.

The court below thus imposed upon plant guards who happen to be deputized by local authorities the same disabilities in respect to collective bargaining that it had in its first opinion imposed upon plant guards who were militarized. The reasoning by which the court below arrived at this conclusion is marked not only by the same fallacies which characterize its reasoning in the case of militarized guards (*supra,* pp. 100–108), but by additional fallacies which stem from the court's disregard of the distinction between militarized guards and deputized guards insofar as their relationship to their employer and the public is concerned.

In the first place, absent the requirements of military authorities in wartime, no employer, so far as we are aware, is required by state, federal, or local governments to employ plant guards at all. An employer, *qua* property owner, has a right, as do all other citizens, to share in the police protection which appropriate governmental agencies are able and willing to provide. If an employer wishes to have more protection than would normally be accorded his property by the local authorities, he is free to employ individuals to provide such protection. But in such cases government does not normally assume the responsibility for providing the additional protection,[11] nor does it assume the economic

[11] The one possible exception to this statement which has come to the attention of the Board is the situation which existed under a Florida statute, enacted in 1943 as a war measure (Chapter 21798, Laws of Florida 1943), which authorized county sheriffs to "furnish adequate guard service to vital war industries if requested so to do by such industries, provided such industries reimburse said sheriffs the actual cost of such guard service." In *Matter of Tampa Shipbuilding Company, Incorporated*, 62 N. L. R. B. 954, 67 N. L. R. B. 1359, the company contended that deputized guards furnished by the sheriff under this statute were not employees of the company but were employees of the county. The Attorney General of Florida took the same view in an action which he brought to enjoin the Board from conducting a hearing in that case. See *Florida* v. *Bellman*, 149 F. 2d 890 (C. C. A. 5). Because the statute left in the hands of the company "real control over the terms, conditions of employment, and the activities" of the guards, the Board rejected this view. 62 N. L. R. B., at 957–961.

burden of compensating such employees or directing their performance of duty. The most that government does in such circumstances is to vest in the private employees police powers to enable them to make arrests and enforce the law. If at any time a government is of the opinion that its police forces are inadequate to cope with "disorderly and criminal acts" it is of course free either to augment its regular police forces or to deputize private citizens, whatever their occupations, and no matter by whom employed, to assist in maintaining or restoring order in the community. It is for this reason that the state normally imposes no duty upon private employers to hire plant guards, nor does it impose upon private citizens the duty to accept or remain in such employment. The only obligation to the state which a plant guard assumes upon being deputized is that which any private citizen assumes when he is deputized, *i.e.* to perform his policing duties faithfully under the laws and the Constitution. The public duties of deputized plant guards thus are not created by, nor are they peculiar to, the guards' relations with private employers.

The court below found a threat to faithful performance of public duties by deputized guards to inhere in the membership of such guards in unions composed of production workers. It apparently believed that in case of a strike by the

production workers the plant guards, if union members, would be tempted either to join the strike or to fail to arrest strikers who committed "disorderly or criminal acts." Even if it be assumed, as is by no means clear, that plant guards, when deputized, undertake to refrain from striking against their private employers, it would by no means follow that plant guards should therefore be denied the right to bargain collectively through unions of their own choosing.

We have demonstrated above that even militarized plant guards, who clearly gave up their right to strike, could not be required to sacrifice in addition their rights to collective bargaining (*supra*, pp. 104–107). And the fact that deputies and special policemen assume obligations to the public to apprehend criminals can certainly not be regarded as a reason for denying to such persons the right of free association and collective bargaining. Deputized plant guards, like all other employees, enter into union membership subject to their duties to the public. The danger that such duties to the public may not be faithfully performed is, as it must be, adequately guarded against by the power of the state to punish disloyalty; not by the denial to citizens of their fundamental right of free association.

In the case of deputized guards, as in the case of militarized guards, the court below failed to realize that the employees involved were already serving *two* masters without noticeable detriment

to their duties to the public. The interests of the plant management and the public are as likely to conflict as are those of the employees and the public. The Circuit Court of Appeals for the Seventh Circuit illustrated one such situation in its opinion in the *Atkins* case when it discussed the possibility that a plant guard might find it necessary in the performance of his duties to the government to arrest an official of the company (*Atkins,* R. 359–360). Certainly there is every reason for a private plant guard who is also a public officer to desire to stand well in the eyes of the plant management which has the sole and exclusive power to hire and fire and to fix his wages, hours and working conditions. To arrest the president of the company in pursuance of duties to the government would, to say the least, require a choice between conflicting loyalties. The court below in the *Atkins* case correctly assumed that the guard would act according to his paramount duties to the public. That assumption is equally applicable where the conflict is between the public and the guards' fellow union members.

Indeed, this assumption has experience as well as reason to recommend it. In the *Jones & Laughlin* case the guards were and remained members of the union to which respondent's production workers belong during the period when they were both militarized and deputized (*supra,* pp. 5, 12, 17), and after demilitarization when their only public duties were to the authorities which deputized them.

Neither respondent nor any public authority has made any claim that their performance of duty during this period was in any way unsatisfactory. Since, as we have shown (*supra*, pp. 57–64, 102–107), the alleged conflict of loyalties arises as soon as guards join and assume obligations to the union, and not merely when collective bargaining rights are extended to them, there is no reason to believe that extension of collective bargaining rights will induce the guards to behave less loyally than they have thus far. Quite the contrary is true. For the denial of collective bargaining rights by an employer is likely, as Congress found, to give rise to strikes and industrial disputes, one of the very evils which led the court below to decide as it did. Once an employer is required to recognize and bargain collectively with the representative selected by its guards, that danger is minimized.

In many cases from 1936 to the present time, the Board has upheld the right of deputized plant guards to bargain under the Act through unions which also represent the employer's production and maintenance employees.[42] Indeed,

[42] We are informed that the National Mediation Board has also decided between 20 and 30 cases involving the same question and that its power to certify as representatives of units of deputized guards labor organizations representing other railroad employees has never been challenged. Cf. Seventh Annual Report of the National Mediation Board (1941), p. 8.

that bargaining pattern has been present in almost 90 percent of the cases involving plant guards generally and deputized guards in particular. Where the employer or the union so requests, the Board establishes a separate unit for deputized guards.[43] The Board's numerous certifications in cases involving plant guards have given rise to a large number of collective agreements between unions representing deputized plant guards as well as production workers, and employers. At no time has a showing been made that the operation of such agreements has jeopardized the interests of public authorities. Cf. *Matter of American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355, 1364–1365.

Sheer speculation concerning what the public interest requires affords no warrant, we submit, for destruction by the courts of rights and privileges which the officials directly charged with the duty of protecting those very public interests do not deem incompatible with the general welfare.

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[43] Matter of *Bendix Products Corp.*, 3 N. L. R. B. 682, 688; *Matter of Westinghouse Electric & Mfg. Co.*, 28 N. L. R. B. 799, 801, 802; *Matter of General Motors Corp.*, 39 N. L. R. B. 1108, 1111–1113; *Matter of American Brass Co.*, 41 N. L. R. B. 783, 784–785; *Matter of Westinghouse Airbrake Co.*, 42 N. L. R. B. 525, 526–527; *Matter of Bethlehem-Fairfield Shipyard, Inc.*, 61 N. L. R. B. 901, 905–906; *Matter of Standard Steel Spring Co.*, 62 N. L. R. B. 660, 662–664; *Matter of Frick Co.*, 63 N. L. R. B. 836, 841.

II

DEMILITARIZATION DOES NOT RENDER MOOT EITHER THE BOARD'S ORDERS IN THESE CASES OR THE QUESTIONS WHETHER MILITARIZED PLANT GUARDS ARE EMPLOYEES WITHIN THE MEANING OF SECTION 2 (3) OR WHETHER THEY ARE ENTITLED TO BARGAIN COLLECTIVELY THROUGH LABOR ORGANIZATIONS REPRESENTING SEPARATE UNITS OF PRODUCTION AND MAINTENANCE WORKERS

In its petition for rehearing filed with the Circuit Court of Appeals for the Sixth Circuit, after that court's original opinion in the *Jones & Laughlin* case, the Board pointed out (*Jones*, R. 93, n. 6) that the guards employed by the respondent Jones & Laughlin had been demilitarized. This statement was appended to the Board's observation that the military authorities had not deemed the additional duties imposed upon plant guards by militarization any reason to deny them the full benefits of the Act. In the Board's petition for a writ of certiorari in that case and in the *Atkins* case, Nos. 1237, 1238, October Term, 1944, the Board pointed out that the guard forces at the Jones & Laughlin plants had been demilitarized on May 29, 1944 and that the guards at the E. C. Atkins plants had been demilitarized on January 6, 1944 and March 7, 1944 (Pet., p. 27, n. 18). The Board asserted at that time that "this change of conditions neither renders the cases moot nor reduces the necessity of a ruling by this Court upon the questions presented" (Pet., p. 27).

This Court granted writs of certiorari, vacated the judgments below, and remanded the cases to the respective circuit courts of appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders" (325 U. S. 838).

In the courts below following the remand, the Board maintained the position which it had taken in its petition for writs of certiorari to this Court, that neither the cases nor the questions presented had become moot. The Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case expressly announced its agreement with the Board's position on this issue (*Atkins*, R. 321). It stated that demilitarization was "irrelevant * * * to our decision that the plant guards were not employees of respondent within the meaning of the Act." It reaffirmed its view that the guards, who were militarized at the time of respondent's refusal to bargain, were not then employees within the meaning of Section 2 (3) of the Act. While expressing doubt that the demilitarization of the guards would affect its conclusion that extension to them of the benefits of the Act "would be or is likely to be inimical to the public welfare," the court below, in view of the demilitarization, withdrew this alternative holding from the case (*ibid.*)

The Circuit Court of Appeals for the Sixth Circuit, while agreeing that demilitarization of

the guards did not render the case moot (*Jones*, R. 120–122), did not explicate its views with respect to the effect of demilitarization upon its prior refusal to enforce the Board's order.

The Board's orders rest on holdings that the respondents, by refusing to recognize and bargain with the representatives selected by the militarized guards, violated the Act. These orders are entitled to enforcement only if the Board is correct in these holdings. For unless the employers were legally bound to recognize and bargain with the guards at the time of their refusal to do so (when the guards were militarized), the employers have committed no unfair labor practice and there is nothing upon which the Board's orders can stand. The Board did not find that either of the respondents had engaged in unfair labor practices by refusing to bargain with the guards after demilitarization. It could not have so found because demilitarization did not occur until after the Board's orders were issued. These cases therefore cannot rest solely on the duty of an employer to bargain with the representatives selected by demilitarized guards, but it must also be decided whether an employer has a duty to bargain with the representatives selected by militarized guards.

The Board's order in each of these cases is, of course, a continuing direction to bargain collectively with the representative designated by the plant protection employees, not because of their militarization, but despite it. Each of the re-

spondents' guard forces has continued in existence since demilitarization (*Jones,* R. 114–117; *Atkins,* Stipulation, pp. 9–12, 18–19). It is to be presumed that the representatives selected in the elections continue to be their representatives. Cf. *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U. S. 702; *Matter of Wilson & Co.,* 67 N. L. R. B. 662, 663, 666–670; *Matter of Crucible Steel Co.,* 66 N. L. R. B. 1157, 1159, 1161–1162. Demilitarization, as the courts below both held, cannot make the Board's orders moot. *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 334; *Federal Trade Commission* v. *Goodyear Co.,* 304 U. S. 257, 260; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271.

We submit therefore that the Court of Appeals, for the Sixth Circuit, in its opinion on remand was bound to decide, as did the Seventh Circuit in the *Atkins* case, whether demilitarization altered the view which it had initially taken of the duties of an employer to bargain with plant guards *when militarized* and that, by failing to decide this question, the Circuit Court of Appeals for the Sixth Circuit erred. Nevertheless, in view of the explanation of its initial opinion contained in its opinion on remand (*Jones,* R. 120), and in its opinion in the *Packard* case, No. 658, this Term (R. III, 2106), as well as its holding in this case following the remand, it may be assumed that the court below, had it considered this question, would

have decided that the demilitarization of the guards did not affect its initial conclusion that respondent properly refused to bargain with the representatives selected by its militarized guards. Indeed, the reference in the court's opinion on remand to the plant guards' "obligations to the unions and their fellow workers which might well, in given circumstances, bring them in conflict with their obligation to their employers" (*Jones*, R. 120) indicates that the court below would probably have refused to enforce the Board's order even if the guards had not been militarized at the time of respondent's refusal to bargain. If therefore it be assumed that the right of militarized plant guards, as employees under the Act, to bargain through unions representing production workers was properly before the Sixth Circuit at all (see *infra*, pp. 126–127), the fact of the demilitarization which occurred subsequent to respondent's refusal to bargain and subsequent to the Board's order, could not take this issue out of the case.

III

IN THE *JONES & LAUGHLIN* CASE, NEITHER THE EFFECT OF DEPUTIZATION UPON THE COLLECTIVE BARGAINING RIGHTS OF PLANT GUARDS, NOR THE RIGHT OF PLANT GUARDS TO SELECT AS BARGAINING REPRESENTATIVES LABOR ORGANIZATIONS WHICH ALSO REPRESENT THE EMPLOYER'S PRODUCTION AND MAINTENANCE EMPLOYEES, SHOULD HAVE BEEN CONSIDERED BY THE COURT BELOW

In the *Jones & Laughlin* case the Sixth Circuit Court of Appeals, both in its initial decision, and

in its opinion after the remand, failed to give effect to limitations imposed upon reviewing courts by Section 10 (e) of the Act. Holding inapplicable this Court's statement that the Act "expressly deprives the reviewing court of power to consider" facts not introduced before the Board (*National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241, 249–250), the court below, over the Board's objection, considered the facts relating to the status of the guards as private police officers as though these facts, which had never been presented to the Board, and which appeared only in the stipulation entered into by counsel following the remand, "had been presented at the hearing before the Board" (*Jones,* R. 120). This departure from well-settled principle obviously cannot be justified under the terms of the remand which directed the court to consider only the "alleged changed circumstances with respect to demilitarization." The guards, as the stipulation shows (*Jones,* R. 114–117, see also n. 7, p. 21 *supra*), occupied the same private police status throughout the period of militarization as they did after demilitarization; that status, therefore, could not be considered as a "changed circumstance" attributable to demilitarization. Moreover, the remand, fairly read, appears to authorize inquiry into the "alleged changed circumstances"

only for the purpose of determining whether the Board's order was rendered moot, or, in the alternative, whether an alleged obstacle to enforcement of the Board's order had been removed. We submit that it cannot be read as authorizing decision on the merits of the Board's order on the basis of facts never brought to the attention of the Board.

In more than forty cases the Board has dealt with the question of the collective bargaining rights of plant guards who are deputized by local police authorities.[44] It was clearly improper for the court below to decide this important question in a case where the issues concerning deputization were neither presented to nor considered by the Board.

In both its initial decision and its decision on remand, the Sixth Circuit Court of Appeals also ignored the prohibition of Section 10 (e) that "no objection that has not been urged before the Board * * * shall be considered by the court." Throughout the proceeding before the Board, Jones & Laughlin's sole contention was

[44] The issue of the bargaining rights of deputized plant guards is pending in the circuit courts of appeals. *Wilson & Co.* v. *National Labor Relations Board* (on petition to review 67 N. L. R. B. 662), now pending in the Eighth Circuit, and *Armour & Co.* v. *National Labor Relations Board* (on petition to enforce 63 N. L. R. B. 1200), now pending in the Tenth Circuit.

that plant guards normally, and particularly when militarized, were a part of management and therefore not employees within the meaning of the Act (*Jones*, R. 6–8, 38–40, 56, 57, 68–70). At no time did respondent urge that if the plant guards were held to be employees, they should nevertheless be denied the right to bargain collectively through a union which also represents the employer's production and maintenance employees; yet the court below, of its own motion, declined to enforce the Board's order on this stated ground (*Jones*, R. 87–89, 119–122).[45] This

[45] Respondent's failure in the instant proceeding to object to the Board's order on this ground is to be contrasted with its position in a case involving the plant guards at its Pittsburgh Works, *supra*, pp. 15–16, in which the respondent "moved to dismiss the Petition because the Petitioner is the same labor organization that represents production and maintenance employees in all of its steel plants" (*Jones*, R. 59–60). In the instant case, respondent referred to the pendency of the proceeding involving the Pittsburgh Works for the sole purpose of explaining and buttressing the allegation in its answer to the Board's complaint that respondent's "refusal to bargain is qualified and conditional and not final and conclusive as alleged" (*Jones*, R. 40, 49–50). Respondent took the position that it would finally decide whether or not to bargain with the Steelworkers only after the Pittsburgh case was concluded (*Jones*, R. 47, 48–50, 55–60). At no time did respondent seek to incorporate by reference in this case the objections which it had raised in the Pittsburgh case, nor did it in any other manner urge the Board to disqualify the Steelworkers from representing the guards on the ground that the Steelworkers already represented the production and maintenance employees. Since the

action of the court below appears to be inconsistent with the applicable decisions of this Court. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 326 U. S. 706; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253. The important question respecting the power of the Board, under Section 9 (b), to restrict the freedom of choice of representatives of employees in an appropriate unit should not have been decided in a case where, because the issue was not raised, the Board neither considered the question nor explicated its view of the powers conferred upon it by the Act. Nor was it proper for the court below, having held that the plant guards were employees of respondent, to impose a limitation upon their choice of representatives for which respondent did not contend.

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issue was not raised, the Board's decision in the unfair labor practice case makes no mention of the point, and the only reference to it in the representation case decision (*Jones*, R. 52–55) does not discuss the power of the Board to limit the range of choice of bargaining representatives open to employees in an appropriate unit, or the considerations of public importance which support the Board's general policy of refusing to restrict plant guards' choice of representatives to unions other than those already representing other units of employees of the particular employer. Cf. *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973, 976–977.

CONCLUSION

The judgments of the courts below should be reversed and the causes remanded with directions to enforce the Board's orders in full.

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Acting Solicitor General.

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FEBRUARY 1947.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or

other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and

who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

* * * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX B

War Department Regulations providing for the organization of a civilian auxiliary to the military police units:

WAR DEPARTMENT

HEADQUARTERS, ARMY-SERVICE FORCES
WASHINGTON

CIRCULAR No. 15 MARCH 17, 1943

AUXILIARY MILITARY POLICE

Circular No. 52, Headquarters, Services of Supply, August 28, 1942, subject, "The Military Organization of Plant Guard Forces," is rescinded, and the following substituted therefor:

1. *Purpose of military organization.*—*a.* Executive Order No. 8972, December 12, 1941, authorizes the Secretary of War (and the Secretary of the Navy) "to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury and destruction certain strategic premises, materials, and utilities." Accordingly, the Secretary of War directed the military organization of plant guard forces as Auxiliary Military Police (see attached letter, The Adjutant General's Office, AG 231.43 (7-2-42) MS-SPAAM-M, July 2, 1942, subject, "Military Organization of Plant Guard Forces.") The purpose is to increase the authority, efficiency, and responsibility of guard forces at plants important to the

prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations.

b. Nothing in this circular will be construed as modifying the responsibility of plant managements "for providing adequate protection at all times against all hazards," (par. 4, Memorandum No. S380–4–43, Office of The Adjutant General, Feb. 18, 1943, subject, "Responsibilities for Internal Security.") The plant guard officer (see par. 4*d*) may, however, take appropriate action through the plant management to correct any condition deemed by him to result in or threaten defective or inadequate performance by the guard forces of its ordinary protective duties.

c. The term "plants" as used in this circular includes civilian plants and installations important to the prosecution of the war; War Department plants, posts, camps, and stations; civilian or municipal plants and facilities essential to power, communication, and transportation; other facilities and installations deemed important to the prosecution of the war.

d. The phrase "plants assigned for protective survey and inspection" used in paragraph 1, attached letter, refers to plants and facilities on the Master or Service Command Responsibility List. Before the guard forces at any civilian or municipal plants are militarized, the plant must appear on the Master or Service Command Responsibility List.

2. *Mission of the Auxiliary Military Police.—a.* The mission of a guard force of Auxiliary Military Police is—

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(1) To provide internal and external protection of the plant against sabotage, espionage, and natural hazards.

(2) To serve with the Army in providing protection to the plant and its environs in emergency situations.

b. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; enemy action by air raid; fifth column activity; paratroop attack or invasion; or it may arise from any other condition or circumstance involving the plant or its community making it necessary to place in operation one or more of the emergency plans of the War Department or of the service command.

c. A guard force or any member thereof, whether on or off duty, may be assigned to duty in an emergency at places other than the premises of the plant normally served, provided only that in the opinion of the plant guard officer or other representative of the Army in command such assignment will contribute to the protection of the guard force's own plant and its environs or to the protection of its production.

3. *Persons eligible for membership in Auxiliary Military Police.—a.* The plant guard officer will determine in each case which groups of employees, in addition to the regular plant guard force, may become members of the Auxiliary Military Police. Persons such as firemen, watchmen, and women guards may be included provided they are able physically to perform the mission and duties of the Auxiliary Military

Police described herein and in the agreement signed by the Guards. Women guards may be armed, but in view of the congressional policy that women's auxiliary forces be limited to noncombatant duty, it is directed that in formulating plans for any emergency situation requiring the use of force against the enemy, such plans will provide for the assignment of any women members of the Auxiliary Military Police to noncombatant activities.

b. No minimum number of guards is required for the militarization of any guard force. Guard forces, no matter how small, will be militarized if the plants which they guard are so located that the guards can be organized, trained, and commanded efficiently by available Army personnel, and if, in the opinion of the plant guard officer, the results obtainable are commensurate with the effort involved.

c. Employment of an alien as a plant guard must be approved by the Secretary of War in the same manner as employment of an alien having access to work on classified or aeronautical contracts.

4. *Responsibility for military organization, training, and command of the Auxiliary Military Police.—a. The Provost Marshal General.*—The Provost Marshal is charged with the general supervision of activities relating to the Auxiliary Military Police as a part of the internal security program. Requests for legal opinions relating to the Auxiliary Military Police will be made through military channels to the Provost Marshal General.

b. Commanding generals of service commands.

(1) The commanding generals of service commands are responsible for the military

organization, training, and command of the guard forces at all plants and installations within their respective service commands except plants and installations which are under the continuing protection responsibility of the Navy, ports of embarkation, and plants and installations which in the opinion of the Provost Marshal General should be exempt from such organization.

(2) At ports of embarkation, the local commanding officer is responsible for the military organization, training, and command of the guard forces. The commanding general of the service command will be advised, if he so requests, of the number, location, equipment, and state of training of such guard forces, and he may make recommendations in connection therewith. The commanding general of the service command may inspect these guard forces at times convenient to the local commanding officer.

c. Commanding officer having jurisdiction over the guard forces. (See par. 3, attached letter.)

(1) *Plants and installations having no local resident commanding officer.*—The commanding general of the service command will designate an officer to be the commanding officer having jurisdiction over the guard forces of plants and installations at which there is no local resident commanding officer. This officer will be the commanding officer of the district of the service command in which the plant or installation is located, unless the commanding general of the service command directs otherwise.

(2) *Plants and installations with a local resident commanding officer.*—The commanding officer having jurisdiction over the guard forces of plants and installations (in-

cluding ports of embarkation) at which there is a resident local commanding officer will be such commanding officer.

(3) In all matters pertaining to military organization, training, and command of the Auxiliary Military Police, the commanding officer having jurisdiction over the guard forces (except such officer at ports of embarkation) will report to the commanding general of the service command.

d. Plant guard officers.

(1) For each plant or group of plants at which there is no local resident commanding officer, the commanding generals of service commands will appoint or cause to be appointed a commissioned officer called the "plant guard officer" to have command (see par. 6*a* (1)) of the guard force.

(2) At each plant where there is a local resident commanding officer, this officer will either serve as plant guard officer himself; appoint an officer from his command so to serve; or request the commanding general of the service command to appoint or cause to be appointed a plant guard officer.

(3) The plant guard officer is the member of the Army of the United States in command (see par. 3*c*, attached letter) of the guard force, and will report direct to the commanding officer having jurisdiction over the guard force (see *c*, above) on all matters pertaining to the military organization, training, and command of the Auxiliary Military Police. Noncommissioned officers from the Army of the United States will be assigned when available to the plant guard officers for the purpose of assisting in military drill and instruction.

e. Termination or change of continuing protection responsibility.

(1) If a plant at which the guard force has been organized as Auxiliary Military Police is removed from the Master or Service Command Responsibility List, the commanding general of the service command will determine whether such guard force will be continued as Auxiliary Military Police, and trained and commanded as before, or whether its status as such will be terminated. In the latter event, each member in good standing of such force will be issued a Certificate of Meritorious Conduct (see par. 6*c*).

(2) Should the responsibility for the continuing protection of any plant at which the guard force has been organized as Auxiliary Military Police be transferred from the Army to the Navy, each member in good standing of the force will be issued a Certificate of Meritorious Conduct prior to the actual assumption by the Navy of the responsibility for continuing protection.

5. *Activation of organization of Auxiliary Military Police.—a. Articles of War explained.*

(1) Guard forces which have not been organized as required (see par. 1, attached letter) will be assembled at the earliest practicable date by the plant management at the request of the plant guard officer. At this assembly the Articles of War as prescribed by Article of War 110 will be read and explained to each member of the guard force (par. 3*a*, attached letter) by the plant guard officer or in his absence or unavailability by some other competent person who is an officer of the Army or civilian officer of the Auxiliary Military Police. As certain of the Articles of War

are generally inapplicable to Auxiliary Military Police, the foregoing directive will be considered complied with if Articles 2, 58, 59, 61–64, 66, 68–74, 76, 81–83, 85, 88–90, 92–94, 96, 104, and 105 are read and explained. These Articles define certain offenses punishable by court martial of which persons subject to military law may be guilty.

(2) The Auxiliary Military Police, immediately after the Articles of War have been read and explained, will be impressed with the fact that the Government of the United States is directly interested in the security and protection of the plant and its production as essential to the successful prosecution of the war. To this end the plant guard officer will issue and post a guard order reading, with appropriate variations to meet local conditions, substantially as follows:

Guard Order No.____

To the Auxiliary Military Police at_____

1. On (date) the guard forces at this plant were activated by the War Department as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

2. All members of the guard force are subject to the Articles of War and may be Court martialed or otherwise punished for violations thereof.

3. Effective on this date _____, a commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military Police.

4. The mission of this guard force is to provide protection for this plant. In addition to its normal functions the force or any member thereof whether on or off duty is available for military use in any emergency, whether it be the result of flood, conflagration, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. *No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.*

5. The Government of the United States regards the protection of this plant and its production as essential in the successful prosecution of the war. The Auxiliary Military Police are ordered to provide this necessary protection and to ward off danger or threat of danger of any kind and from any source. If force must be used to accomplish this result, it will be used only to the extent reasonably necessary.

6. No member of the Auxiliary Military Police may resign without the written approval of the plant guard officer. Inattention to duty, failure to attend required drill, and conduct unbecoming to the service may be cause of dismissal and the denial of a Certificate of Meritorious Conduct.

For the Commanding Officer, _____ District:

_____
(Date)

_____
(Plant guard officer)

The foregoing guard order will be issued in accordance with the provisions of *c* below.

b. Pledge and agreement.

(1) At the time of reading the Articles of War, each member of the guard force will

give the pledge of loyalty to the United States and execute the agreement, prescribed form of which is shown in the inclosure to the attached letter. A separate pledge or oath is not required. If a guard refuses to sign the agreement, he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as replaced, and in any event within a reasonable time. The signed agreement will be retained by the plant guard officer. The guard force will be considered as a civilian auxiliary to the Military Police when 75 percent of the guards at a given plant have signed the agreement. (See par. 3, attached letter.) A certificate of membership in the Auxiliary Military Police will be issued each member. Forms will be supplied to the commanding generals of service commands by the Provost Marshal General.

(2) Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released from his obligations. This will take place when competent military authority has approved of his dismissal or resignation (see par. 6*b*.) or when he has been discharged without honor (see par. 6*c*).

c. Auxiliary Military Police orders and regulations.

(1) Orders and regulations for the Auxiliary Military Police from the military authority will be issued in the name of the commanding officer having jurisdiction over the guard forces. (See par. 4*c*.)

(2) At civilian-operated plants, such orders will be issued only after consultation with and, if possible, concurrence by the plant management.

6. *Status of Auxiliary Military Police.—a. Control.*

(1) The Auxiliary Military Police will continue to function as formerly, except that a member of the Army of the United States will be in command at all times, and except that they will be trained and instructed with a view to supplementing the Army in affording protection in emergency situations (see par. 2*b*). Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations. Although the plant guard officers will be in command at all times, *they will not supplant the civilian guard officers,* and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management.

(2) The Auxiliary Military Police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities. Attempts to intimidate them or to reduce or nullify their efficiency, or interfere with the performance of their mission, may constitute a violation of Federal as well as state criminal laws. When such incidents are suspected, an inquiry will be made and a detailed report will be sent immediately through channels to the office of the Provost Marshal General as a basis for requesting an investigation or prosecution.

b. Employer-employee relationship.

(1) Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant man-

agements. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer, and those who are Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer in accordance with Civil Service regulations. In neither case is a court martial necessary.

(2) A member of the Auxiliary Military Police may not be employed or dismissed and may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant's guard force would be impaired and declines to give his approval thereto.

c. Certificate of Meritorious Conduct.—A Certificate of Meritorious Conduct will be issued to each member of the Auxiliary Military Police whose service is terminated honorably. Forms will be supplied to the commanding generals of service commands by the Provost Marshal General. In the event of termination of service under conditions other than honorable, no such certificate will be issued. The commanding general of the service command may authorize a communication to each member of the Auxiliary Military Police whose service is terminated under conditions other than honorable, which will state only the fact of termination, the date, and that the communication is not a Certificate of Meritorious Conduct.

d. Discharge without honor.—If a member of the Auxiliary Military Police permanently quits his employment without approval of the plant guard officer or other duly authorized officer, a notice substantially as follows may be transmitted to him and a copy posted on the plant bulletin board:

SUBJECT: Discharge without honor.
To:

This is to notify you that you are discharged without honor as a member of the Auxiliary Military Police. A copy of this discharge and full statement of facts concerning your absence from duty without leave are being furnished the Provost Marshal General and the Selective Service System, Washington, D. C., for such further action as may be deemed appropriate.

By command of (Commanding General, _____ service command)

Discharge without honor will be regarded as exceptional procedure applicable to exceptional cases when the guard in fact is no longer in the employ of the company and is not available for dismissal, suspension, or reprimand. It should be used only after careful investigation of the facts, which may include a hearing if deemed advisable.

e. Appeal from dismissal.—A member of the Auxiliary Military Police employed by a civilian employer, discharged without honor or dismissed by or at the request of the plant guard officer or other authorized War Department representative (except by court martial proceedings), may, within 30 days of such discharge or dismissal, appeal through channels to the next superior Army authority in writing to reconsider such action. Such appeal will include a brief signed statement of the reasons for regarding the action unjust. If a member of the Auxiliary Military Police is discharged without honor or dismissed for an offense constituting a violation of the Articles of War, he may ask for a trial by court martial.

f. Employee benefits.—The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected. Employers should have a clear understanding with their insurance companies concerned.

g. Contractual relations.—It is not anticipated that the organization of plant guards as Auxiliary Military Police necessitates changes in existing contracts with the Government, but in any exceptional case where such alterations are essential to carry out the organization, arrangements to effect the necessary changes will be initiated by the plant guard officer with the least delay possible.

h. Labor relationships.

(1) If any proposed labor agreement is being considered which involves plant protection employees who are or may become members of the Auxiliary Military Police, the contracting parties will be urged to insert in such agreement a provision substantially as follows:

"It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military organization of the plant guard forces (letter, The Adjutant General's Office, AG 231.43 (7-2-42) MS-SPAAM-M, July 2, 1942, subject, "Military Organization of Plant Guard Forces"; and Circular No. 15, Headquarters, Army Service Forces, March 17, 1943, subject, "Auxiliary Military police;" and any amendments thereto), and that nothing contained in this agreement will be construed in any way to interfere

with the organization, efficiency, training, and control by the War Department of the company guard force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Deparment upon any employee in such Auxiliary Military Police."

(2) Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see In re Ford Mfg. Co. & United Rubber Workers of America, CIO, Case No. R–4826, February 1943), the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies.

7. *Qualifications and equipment of Auxiliary Military Police.—a. Physical fitness.*—A member of the Auxiliary Military Police must be physically fit to perform his duties properly and in an efficient manner. It is sufficient if his physical fitness satisfies the plant guard officer.

b. Uniform.—Each member will be properly uniformed by the plant. A complete uniform consisting of blouse or shirt, trousers, and hat is not required although

the complete uniform is preferred. The plant guard officer will determine, with due regard to all circumstances, whether his guard force is "properly uniformed."

c. Distinctive insignia.

(1). Because the mission of the Auxiliary Military Police includes service with the Army (see par. 2*b*), the laws of war require that members wear distinctive insignia or marks capable of recognition at a distance. By wearing such insignia or marks members serving with the Army will be recognized as legitimate troops and not deemed irregulars or guerillas. Accordingly, members of the Auxiliary Military Police will wear either—

(*a*) An arm band (brassard), white, with the words "Auxiliary Military Police" in blue, such as has been distributed to commanding generals of service commands for issuance; or

(*b*) A badge or patch which may be worn on the right or left sleeve, at the shoulder or cuff level, or on the right or left breast pocket, either of a design substantially similar to the drawing attached to the letter, Office of the Provost Marshal General, SPMGS 231.4, November 28, 1942, subject, "Distinctive Insignia for Auxiliary Military Police," or of any other design, capable of recognition at a distance, bearing the words "Auxiliary Military Police," and approved by the commanding general of the service command.

Commanding generals of service commands will determine the device that will be worn by a given guard force and the manner and time of wearing it. Badges or patches must be procured by the plants

adopting them, at their own expense, and may be manufactured of any noncritical material. Commanding generals of service commands may also authorize plants to procure at their own expense arm bands, similar in appearance to those already issued, of any color combination capable of recognition at a distance and manufactured of any noncritical material.

(2) Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six months of service faithfully performed. Service stripes will be in accordance with Army Regulations (see par. 27*c*, AR 600–35, Nov. 10, 1941, "Personnel—Prescribed Service Uniform"; par. 46*e*, AR 600–40, Aug. 28, 1941, "Personnel—Wearing of the Service Uniform"), except that they will conform in material and color to the chevrons furnished by the plant management to noncommissioned officers of the guard force.

(3) Commanding generals of service commands may authorize a guidon for an Auxiliary Military Police force which has shown itself outstanding in training, appearance, and efficiency.

d. Identification cards.—Each member of the Auxiliary Military Police must carry at all times an identification card bearing his photograph, fingerprints, signature, and description properly authenticated by the plant guard officer. As no special form of card is required, existing cards which can be made to satisfy all of these requirements may be utilized. The description of the guard need not be in detail, and will be sufficient if it contains easily recognizable characteristics such as color of hair and eyes, height, weight, and age.

e. Arms.

(1) The Auxiliary Military Police must be armed with appropriate weapons furnished by the plant management if such arming is recommended by the plant guard officer. Any sidearm, rifle, or shotgun may be an appropriate weapon depending on the circumstances. Training in the use of firearms and providing ammunition therefor are functions of the plant management. If the plant guard officer determines that the Auxiliary Military Police are not sufficiently trained in the use of firearms or are not adequately qualified in marksmanship, he may require the plant management to give further training and when he deems it desirable may accomplish such training himself.

(2) The Auxiliary Military Police, as agents of the Federal Government, will not be subject to any state or municipal requirement which conflicts with their wartime duties. A member of the Auxiliary Military Police required to be armed in performance of his duties will not be compelled to obtain a license, permit, or bond to possess small firearms in order to comply with local statutes or ordinances. State authorities have concurred when this question has been presented. The full cooperation of state and local authorities will be obtained and local requirements met unless a satisfactory understanding is reached.

f. Deputizing.—In general, there will be no considerable additional advantage in deputizing members of the Auxiliary Military Police as sheriffs or marshals. However, there will be individual cases in which it will be advisable to continue the local or state official capacity. The authority of the

plant guard includes power to arrest without a warrant for violation of the Sabotage Act (50, U. S. C., 101–106) or the Espionage Act (50, U. S. C., 21 and 32).

g. Training.

(1) The plant management continues to be charged with the training of its guard forces in their ordinary protective duties. In addition, the guard force must be qualified to perform its mission as set forth in paragraph 2*a*. This includes the ability to serve efficiently with the Army in any emergency situation that may arise (see par. 2*b*). To this end, the Auxiliary Military Police will be trained by or under the direction of the plant guard officer in military subjects to the extent he deems necessary. The use of experienced personnel from within the guard force for the purpose of conducting such training will be encouraged by the plant guard officer. The time to be devoted to such training will be determined by the plant guard officer. It will not exceed one hour per week or its equivalent except with the approval of the plant management.

(2) The military training will consist of such of the subjects listed in (3) and (4) below as the plant guard officer finds appropriate for each guard force, giving due consideration in each instance to the character, experience, previous training, and qualifications of the force as well as the locality and geography of the plant, its importance in the prosecution of the War, and all other pertinent considerations.

(3) Basic military subjects in which training may be given include—

(*a*) Military courtesy and discipline; Articles of War.

(*b*) Defense against air and parachute attack.

(*c*) Interior and special guard duty (military only).

(*d*) Personal encounters.

(*e*) Inspections.

(*f*) Use of weapons—hand grenades, pistol, police riot club, shotgun, tommy gun (where applicable).

(*g*) Military police—organization, duties, powers of arrest, use of force, etc.

(4) Advanced subjects in which training may be given include—

(*a*) Riot formations.

(*b*) Approach marches.

(*c*) Other applicable subjects included in military police tactical unit training.

(*d*) Tactical problems which may be given from time to time to determine the effectiveness of the guard force in emergency situations.

(5) Judgment, initiative, imagination, and a cooperative relationship with the plant management are essential in determining the kind and amount of training to be given. Not only will the training requirements vary in different plants, but the requirements within a given guard force, may vary. Guards will not be required to attend drill or instruction covering subjects in which they are already trained and qualified. Training films, film strips, and film bulletins are regarded as valuable in the military training of Auxiliary Military Police, and the plant guard officer will encourage their use. The necessary projecting equipment, in which there may be a shortage, may often be borrowed from local clubs and similar organizations. The objective of all training is to increase the

efficiency of the Auxiliary Military Police, and unless this is accomplished the plant guard officer has failed in his mission.

8. *Subjection of auxiliary Military Police to military law.—a. Court martial jurisdiction.*

(1) The commanding generals of service commands have general court martial jurisdiction over the plant guard forces within the geographical limits of their commands. The commanding officer of any War Department owned and operated plant and the commanding officer having jurisdiction over the guard forces (see par. 4*c*) have the power to appoint special and summary courts martial, subject to the right of superior authority to appoint such courts when deemed desirable. The commanding officer having jurisdiction over the plant guard forces may also appoint summary courts martial, subject to the right of superior authority to appoint such courts; except that when the plant guard officer is the only commissioned officer present with a plant guard command, he will be the summary court martial of that command and will hear and determine cases brought before him.

(2) The plant guard officer also has the summary disciplinary authority of a company commander pursuant to Article of War 104. Attention is directed to the fact that an offender may not be summarily punished if he demands trial by court martial and also that if, after consenting to receive summary punishment, he deems his punishment too severe he may appeal to the next superior authority for review. Court martial jurisdiction exists at all times, even while the Auxiliary Military Police are off

duty. However, it is inadvisable to order a court martial for offenses committed while off duty and not within the plant premises, unless the offense is directly connected with the individual's duties as a member of the Auxiliary Military Police.

(3) Pending instructions to the contrary, no court-martial proceeding of any nature involving a member of the Auxiliary Military Police will be commenced without the prior approval of the War Department.

b. Discipline.—The institution of a court-martial proceeding will be resorted to only in cases where no other form of punishment will be effective. If the offense involves a violation of a criminal statute or ordinance other than the Articles of War, the individual will be turned over to the civil law enforcement officials.

c. Confinement.—In the absence of an adequate guardhouse or place of confinement, offenders will be confined at the nearest military post having a guardhouse, or turned over to the United States marshal for custody. United States marshals usually have arrangements with the state or local civil authorities for the confinement of prisoners.

d. Punishment.—Unlike the court-martial punishment of a person in military service, a court martial cannot punish a member of the Auxiliary Military Police by reduction in military grade or by forfeiture of pay and allowances. Analogous punishments might be imposed, such as reduction in grade in the guard organization or temporary suspension from duty. A fine, as distinguished from forfeiture, is regarded as an appropriate form of punishment.

e. Dealing with civil authorities.—When a member of the Auxiliary Military Police

injures or kills a person while in the performance of his duties, he will be arrested and detained. If a civil police official seeks to arrest him, the plant guard officer, under the authority of the 74th Article of War, may refuse to release the individual until such release is approved by the commanding general of the service command. A member of the Auxiliary Military Police is entitled to the same protection as a sentinel under similar circumstances. If a writ of habeas corpus is issued for a member of the Auxiliary Military Police held to answer by the military, the procedure of chapter XXVII, Manual for Courts Martial 1928, should be followed.

f. Recognition of meritorious conduct.

(1) Members of the Auxiliary Military Police are eligible for the decoration "Medal of Merit" authorized by the President for award to civilians who distinguish themselves by exceptionally meritorious conduct or by performance of outstanding services. (See Bull. 1, WD, 1943.) All cases of members of the Auxiliary Military Police who, in the opinion of the plant guard officer, deserve consideration for this award will be referred through channels to the office of the Provost Marshal General for transmission to the Medal of Merit Board. A full statement of facts and appropriate recommendations will be included.

(2) Any case of meritorious conduct which in the opinion of the plant guard officer does not warrant recommendation for the award of the Medal of Merit, but which he deems deserving of official commendation, will be the subject of a special order of commendation issued by the commanding officer having jurisdiction over the

guard force (see par. 4c). Such special orders will be issued promptly and with liberality, and will be given appropriate publicity, particularly among the guard force concerned. A copy of each such special order will be furnished to the employer.

g. Prior instructions rescinded.—The instructions contained in all other letters and circulars concerning the organization, training and command of plant guard forces except the attached letter are rescinded.

(SPX 231.43 (2-27-43) SPMGS-MP-FH)

By command of Lieutenant General SOMERVELL:

W. D. STYER,
Major General, General Staff Corps,
Chief of Staff.

Official:
H. B. LEWIS,
Brigadier General,
Adjutant General.

1 Incl.

WAR DEPARTMENT
THE ADJUTANT GENERAL'S OFFICE
WASHINGTON

AG 231.43 (7-2-42) MS-SPAAM-M

JULY 2, 1942.

Subject: Military Organization of Plant Guard Forces.

To: The Commanding General,
Matériel Command, Army Air Forces;
The Provost Marshal General;
The Chiefs of Supply Services.

1. Guard forces at all War Department plants, posts and stations controlled or

operated by the Supply Services or by the Army Air Forces, and at all plants assigned for protective survey and inspection to the Chiefs of Supply Services and to the Commanding General, Matériel Command, Army Air Forces, are to be organized, drilled and instructed as military units subject to the Articles of War. (Art. 2 (d).)

2. These guard forces will be organized as a civilian auxiliary to the Military Police in all ammunition plants and plants where the possibility of sabotage is greatest, giving first priority to those plants which are most vulnerable from the standpoint of sabotage activities. The organization of these civilian guard forces will be extended as rapidly as conditions permit to civilian plants having important government contracts. Priorities will be established in collaboration with The Provost Marshal General.

3. At the time any guard force is organized as a civilian auxiliary to the Military Police, the commanding officer having jurisdiction over the guard force will:

a. Cause the Articles of War prescribed by Article 110 thereof to be read and explained to each member of the guard force;

b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises, and war utilities which the force is assigned to guard.

d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to the military law as long as he remains a member of the guard force. (A draft of a form of such agreement is attached.)

By order of the Secretary of War:

(S) J. A. Ulio,
J. A. ULIO,
Major General,
The Adjutant General.

1 Inclosure.
Draft of Agreement.

COPIES FURNISHED:
The Under Secretary of War;
The Commanding Generals, Army Air Forces; Services of Supply;
The Inspector General;
The Judge Advocate General;
The Chief of Administrative Services;
Staff Divisions of the Services of Supply;
Divisions of the War Department General Staff.

Agreement between the United States of America and _____
(Plant Guard)

In order that th existing military forces of the United States may be most effectively employed in combat activity against the enemies of the United States, the United States is approving the employment of certain guards as a civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise,

including the making of arrests, as peace officers for violations of Federal laws, as well as for violations of orders and regulations issued by military authority. The United States requires that only persons physically fit, well trained in the use of arms and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

Now, therefore, I, _____, who have been or am about to be employed by _____ as a guard at _____ for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

(2) I will bear true faith and allegiance to the Constitution of the United States;

(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers.

(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

_____

(Signature of Plant Guard)

Inclosure to letter, July 2, 1942, AG 231.43 (7-2-42) MS-SPAAM-M.

APPENDIX C

The duties and status of plant guards as defined in the *Dictionary of Occupational Titles.*

GATEMAN—(IV) (any ind.) gate tender; gatekeeper; guard; plant-protection man; watchman, gate. 2-61.01. Stands guard at entrance gate of an industrial plant and grounds, warehouse, or other property, admitting employees and authorized visitors and refusing entrance to unauthorized or unwanted persons; issues passes at own discretion or on instructions from superiors; directs people to various parts of plant or building. May keep count of trucks or other carriers entering and leaving. May perform maintenance duties such as mowing lawns and sweeping gate areas.[1]

WATCHMAN—guard; patrolman; special police; man (any ind.). (I) 2-61.03. Guards an industrial plant, warehouse, or other property against fire, theft, and illegal entry; makes periodic inspection tours about building and grounds, examining doors, windows, and gates to see that they are properly secured and have not been tampered with, and continually watches for irregularities, such as broken water pipes; registers at regular watch stations as a record of having made inspection rounds at specified times. May perform general maintenance duties, such as sweeping

[1] *Dictionary of Occupational Titles*, Part I, Definition of Titles (June 1939), Department of Labor (United States Government Printing Office), p. 408.

floors, or supervise others in these duties. May fire boilers or do other similar duties, or may operate various plant equipment performing productive operations. Sometimes specifically designated according to type of property he guards, as dock watchman, warehouse watchman.[2]

GUARD CAPTAIN—guard, chief; plant-police captain (any ind.) 2-61.71. Directs activities of guard force in protection of an industrial and commercial establishment against trespassing and damage; plans system of posts according to protection requirements of plant; selects and trains subordinates in their duties, including use of weapons, rescue work, and handling of riots or other emergencies; supervises identification of employees and visitors, by fingerprinting, interviewing, photographing, and preparation of badges; responds to calls from subordinates to take charge of protective measures during fires, riots, storms, or other emergencies; insures that safety rules are properly posted and enforced, and reports to appropriate authorities fire extinguishers and other safety apparatus that are not functioning. May maintain liaison with civil or military police authorities on mutual problems. May prepare periodic reports including items such as number of visitors admitted to plant or nature of internal disturbances.[3]

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[2] Op. cit., *supra*, p. 1006.

[3] *Dictionary, Occupational Titles Supplement*, Edition II, July 1943 (War Manpower Commission, Bureau of Manpower Utilization, Division of Occupational Analysis and Manning Tables) (United States Government Printing Office), pp. 144-145.

GUARD LIEUTENANT—guard, chief, assistant; police lieutenant (any ind.) 6–21.71. Assists in enforcing regulations formulated by GUARD CAPTAIN for establishments employing a large protective force, such as arranging work schedules, making periodic inspection of uniforms, and preparing personnel time records. Usually performs duties of GUARD CAPTAIN in his absence. May direct air raid precaution program.[4]

GUARD SERGEANT (any ind.) 2–61.70.—Directs a group of GATEMEN IV, WATCHMEN I and other workers engaged in protection of an industrial plant against damage and trespassing; assists GUARD CAPTAIN or GUARD LIEUTENANT in training and assigning of subordinates; enforces discipline and vigilance on part of subordinates; investigates reports of disturbances; in event of emergencies, such as fire, storm, or riot, takes charges of policing to maintain order, safety to personnel, and to protect plant property; acts as representative of GUARD CAPTAIN in identification of employees and visitors. May call superiors in emergencies.[5]

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[4] Op. cit., *supra*, p. 145.
[5] *Ibid.*

APPENDIX D

MAY 7, 1943.

The Honorable The SECRETARY OF WAR:

DEAR MR. SECRETARY: This will refer to your letter of April 21, 1943, furnishing certain information as to the status of the "Civilian Auxiliary Military Police" organized for the purpose of protecting various industrial plants producing for the war effort. This letter will also refer to a letter to me of March 31, 1943, from Lt. Col. Elbert M. Barron, Chief of the Litigation Division of the Office of the Judge Advocate General, transmitting a letter reciting the details of an assault upon a member of the plant protective forces at the Ford River Rouge Plant at Detroit and calling for federal protection of members of these plant protective forces. Lt. Col. Barron's letter requests the advice of this Department in reference to the matters presented.

An examination of the basic authority pursuant to which the "Civilian Auxiliary Military Police" was organized, including Executive Order 8972, the various statutes providing for the composition of the armies of the United States, and the Articles of War, leads me to conclude that there is no legal basis for the militarization of these plant protective forces. Nor, in my opinion, is there any basis for considering members of these plant protective forces as civil officers or employees of the government. All of the conditions under which these guards are employed and operate

indicate that they are not more than private employees of the particular industrial plant which hires, fires and pays them, with no greater authority or rights than any other private plant employee. Moreover, if members of these plant protective forces were to be regarded as having any federal status, military or civil, the fact that they received their pay from private sources would appear to violate the provisions of Section 66 of Title 5 of the United States Code.

Under the circumstances this Department would not be justified in taking any action under federal law in defense of these guards. Therefore the situation presented by Lt. Col. Barron's letter is not one for action by this Department.

With kind regards,

Sincerely yours,

(Signed) FRANCIS BIDDLE,
Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1947